90-1937

No. 90-___

Supreme Court, U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

Petitioner,

vs.

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether private individuals who are only potentially beneficiaries of specific benefit programs administered with the public trust lands conveyed to Hawaii by § 5 of its Admission Act, Pub. L. 86-3, 73 Stat. 4, and whose benefits will depend on decisions by state officials who have lawful discretion to deny all benefits to such persons, may nonetheless, despite the jurisdictional limits of Article III and the Eleventh Amendment, seek relief in the federal courts whose effect would be only to increase the level of assets in the public land trust?

2. Whether, § 5(f) of the Hawaii Admission Act, which requires that lands subject thereto be used for "one or more" of five purposes "in such manner as the constitution and laws" of Hawaii "may provide," and which authorizes a suit "by the United States" as the stated remedy for the use of trust lands "for any other object," is enforceable by private citizen suits filed pursuant to 42 U.S.C. § 1983, and, if so, whether review in such suits includes not only whether the "one or more" clause has been generally complied with, but also whether each and every state law bearing on the § 5(f) land trust has been obeyed?

3. Whether, in light of the Eleventh Amendment's distinct bar on enforcement of state law against State officials, the dependence of the threshold question below, namely, whether certain lands in Hawaii were transferred to the State by operation of law, on matters of state law independently require Respondent's action in the federal court to be heard in state court, or, alternatively, required the lower federal courts to abstain?

QUESTIONS PRESENTED – Continued

4. Whether, assuming this Court does not wish immediately to grant plenary review, the Court nonetheless should hold this Petition pending this Court's forthcoming decision in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991)?*

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* William F. Paty, the Petitioner in this Court, is the Chairman of the Board of Land and Natural Resources of the State of Hawaii, and the Director of the Department of Land and Natural Resources of the State of Hawaii. He was sued below solely in his official capacity and so appears in this Court. Other persons who were named as Defendants in the District Court, but whose involvement was terminated prior to entry of final judgment in the District Court include John O. Marsh, Secretary of the Army; Colonel Michael M. Jenks, District Engineer, U.S. Army Corp. of Engineers; Lee Thomas, Administrator, U.S. Environmental Protection Agency; Judith Ayers, Regional Administer, E.P.A. Region IX; Transcontinental Development Co., ATPAC Land Co., and Leslie S. Matsubara, Director of the Department of Health, State of Hawaii. *See* Pet App. 15-21.

Respondent Mervin Napeahi alleges that he is of more than one half Hawaiian descent and, for that reason, a Native Hawaiian under the Hawaiian Homes Commission Act, and, it is alleged by respondent, a beneficiary of § 5(f) of the Hawaii Admission Act and certain state constitutional provisions and statutes enacted pursuant to the discretion conferred by the Act, *e.g.*, Haw. Const. art. XII, § 4 (1978). Originally, the Sierra Club, and Hawaii Audubon Society participated as parties Plaintiff, but dropped their participation following a ruling upon motions to dismiss. *See* Pet. App. 94. While a prayer for class action treatment was suggested in the original caption, class certification was never sought, or granted, in the District

(Continued on following page)

QUESTIONS PRESENTED – Continued

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Court. In the Court of Appeals, Respondent continued to caption his pleadings as including himself and "all those similarly situated." *See* 921 F.2d 897. To the extent Respondent continues to treat this case as an inchoate class action, Petitioner deems "those similarly situated" to be respondents, and now places Respondent Napeahi on notice of this.

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No. 90-___

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Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner William F. Paty, Director of the Department of Land and Natural Resources, State of Hawaii, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on December 18, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 921 F.2d 897 and is printed in Appendix ("App.") "A," *infra*. The District Court's order denying Petitioner's motion to dismiss is unreported and is printed in App. "B." The District Court's Decision and

Order after trial, granting judgment to Petitioner, and order denying Respondent's motion under Rule 59, Fed. R. Civ. P., which were in turn vacated in part by the Court of Appeals, are printed in App. "C" and "D." The related opinion in the cause *Price v. Akaka*, appeal No. 89-15169 (9th Cir. Sept. 25, 1991), *pet. for cert. to be filed* (U.S. June 19, 1991), on which the Ninth Circuit panel relied in determining that Respondent had Article III standing and the right to seek redress under 42 U.S.C. § 1983, is reported at 915 F.2d 469 (9th Cir. 1990), and is reprinted at App. "E." The related opinion of the Hawaii Supreme Court in *Trustees of the Office of the Hawaiian Affairs v. Yamasaki*, is reported at 69 Haw. 154, 737 P.2d 46, *cert. denied*, 484 U.S. 898 (1987).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered December 18, 1990, and a timely petition for rehearing and suggestion of the appropriateness of rehearing en banc was filed on January 2, 1991, and denied on March 20, 1991. The time in which this Petition may be filed therefore extends to and includes June 18, 1991, and this Petition is timely. Jurisdiction in the District Court was alleged to have been conferred pursuant to 28 U.S.C. §§ 1331 and 1361. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals, following its decision in *Price v. Akaka*, 915 F.2d 469, 471-72 & n.2 (9th Cir. 1990), determined that it and the District Court had subject matter jurisdiction to determine whether 1.75 acres of land on the Big Island of Hawaii fell within the scope of the 5(f) trust corpus, and, if so, to enter "an appropriate judgment" on respondent's claims for declaratory and injunctive relief which, in material part, sought revocation of state shoreline certifications granted to private property

owners on the Big Island of Hawaii, allegedly in conflict with the duties conferred by § 5(f) of the Act.

Petitioner asserts, as is developed more fully below, that under the rationale of the four-justice plurality in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), which Petitioner urges be adopted by the Court in this case, and other law, Respondent lacked Article III standing and that, under *Papasan v. Allain*, 478 U.S. 265 (1986), and related cases, the relief sought, in a suit in which the private owners are no longer parties, is inconsistent with the bar of the Eleventh Amendment, and other principles governing the jurisdiction of the courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part that

> The Judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies. . . .

The Eleventh Amendment to the United States Constitution provides that

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 1983 of Title 42 of the United States Code provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 5 of the Hawaii Admission Act, Pub. L. 86-3, 73 Stat. 4, 6 (1959), provides in pertinent part that

> (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.
>
> (b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.
>
> (c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.
>
> (d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written

or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States.

(e) Within five years from the date Hawaii is admitted into the Union each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust

> for which suit may be brought by the United States. . . . .
>
> (g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

Sections 4, 5, and 6 of the Hawaii Constitution of 1978, Chapter 10, Haw. Rev. Stat. (1985), as amended by the Act of July 3, 1990, together with relevant provisions of Chapter 205, Haw. Rev. Stat. (1985), are reprinted in Appendix "N," *infra*.

STATEMENT OF THE CASE

In admitting our Fiftieth State to the Union on "an equal footing" with the remaining States, Congress returned to the control of the people of Hawaii, through their new State government, more than 1.3 million acres which are known as Hawaii's "public trust lands." More than 30 years later, despite the doctrines that render a State's management of its own lands of only local concern, these lands constituting more than one fifth of the land mass of the Hawaiian Islands, now face the threat of ongoing, and pervasive federal regulation by a host of private litigants, in so-called "breach of trust" suits under 42 U.S.C. § 1983 to "enforce" § 5(f) of the Admission Act. That law provides only that the trust lands are to be used for "one or more" purposes, defined broadly to include any provision of land "for public use" as "the constitution and laws" of Hawaii "may provide." The sole stated remedy for use of 5(f) lands "for any other object" is a suit "by the United States."

The issue in this case is whether, notwithstanding the broad discretion, and limited remedial structure, set forth in § 5(f), and this Court's consistent refusal, from its elaboration of the Eleventh Amendment and Article III, to the Equal Footing doctrine, to countenance federal interference in the States' management of their own affairs, the Court of Appeals was correct to reinstate a lawsuit, by a private citizen with no legitimate claim of entitlement to any particular benefit from the 5(f) corpus, which seeks, not merely to enjoin land management practices that affirmatively injure, but to compel the State to abrogate other private expectations, and to thereby recover potentially thousands of acres of land under novel theories of Hawaiian law which have never been endorsed by, or even tested before, the courts of the State of Hawaii.

Whether the jurisdiction of the inferior federal courts, and the Civil Rights Act of 1871, 42 U.S.C. § 1983, may be deployed in this fashion is the question to be decided here.

A. The Background of Hawaii's Public Trust Lands.

1. Hawaii's public trust lands,[1] were originally transferred to the United States by the Republic of Hawaii at the time of annexation in 1898, subject to the

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[1] The size of the public trust lands is computed by taking the original lands ceded by the Republic of Hawaii, estimated at roughly 1.8 million acres, and subtracting acreage set aside, before Statehood, by executive orders of the President or Governor of Hawaii for use of the United States, and ceded lands controlled by the United States pursuant to permits, licenses, and permission of the Territory. *See* Legislative Auditor of the State of Hawaii, *Progress Report on the Public Land Trust* 14 (March 1983). Because of the Act of December 23, 1963, Pub. L. No. 88-233, 77 Stat. 472 (1963), the size of the public land trust increases as the United States releases lands under the terms of sections 5(c)-(e) of the Hawaii Admission Act.

condition that "existing laws of the United States relative to public lands" would not apply. See the Joint Resolution to Provide for Annexing the Hawaiian Islands, Resolution of July 7, 1898, 30 Stat. 750 (1898). The United States agreed with the Republic's agents that "all revenue from or proceeds of [said lands,] except regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes." *Id.* The authority granted to the local government of Hawaii by the Joint Resolution was confirmed in section 91 of the Organic Act, Act of April 30, 1900, 31 Stat. 141 (1900), which, among other things, granted the Territory authority to "maintain, manage, and care for" lands not reserved for national purposes, and required consideration earned by the United States on disposition of such land to be turned over to the Territory for such uses as "public works," "or other public purposes." *Id.*

2. When Hawaii entered the Union, Congress reaffirmed the authority of Hawaii's local government to deal with public trust property. Pub. L. No. 86-3, 73 Stat. 4 (1959). Public lands whose title at Statehood was not in the Territory and to which the State did not succeed under § 5(a) of the Admission Act, and which were returned under §§ 5(b)-(e), were granted to Hawaii for disposition for "one or more" of five purposes: (1) "support of the public schools and other public educational institutions"; (2) "betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended"; (2) "development of farm and home ownership on as widespread a basis as possible"; (4) "making of public improvements"; and (5) provision of lands for "public use." § 5(f), 73 Stat. at 6. Congress noticeably did not state that a disposition in

breach of § 5(f) would be "null and void." *Cf.* New Mexico-Arizona Enabling Act, 36 Stat. 557, 575 (1910), *quoted, ASARCO, Inc. v. Kadish*, 490 U.S. 605, 627 (1989). Congress's prescribed remedy for a failure to manage and dispose of "5(f)" land "for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide" would be a "suit . . . by the United States" for "breach of trust." 73 Stat. at 6. As now-Chief Judge Wallace wrote in *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216 (9th Cir. 1978) (*"Keaukaha I"*), the history of § 5(f) lacks "any indication that Congress intended to create a private cause of action via the Admission Act." Thus, "by providing a specific remedy, Congress intended to exclude others." *Id.* at 1223.

3. Although the Hawaii legislature could have lawfully created specific entitlements to 5(f) trust assets for various beneficiary classes, it has not done so, and, has retained, in large measure through the statutes governing the Department of Land and Natural Resources, Ch. 171, Haw. Rev. Stat. (1985), the State's discretion to dispose of 5(f) land for "one or more" of the Admission Act's enumerated purposes. *See* Haw. Rev. Stat. § 171-18 (1985). While the Director's discretion has been qualified by the 1978 state constitution's creation of an Office of Hawaiian Affairs, whose implementing legislation entitles OHA to a percentage of the revenues from public trust lands, *see* the Act of July 2, 1990, Ch. 304, 1990 Haw. Sess. L. 947, Pet. App. "N," *infra*, these mandates do not require the Director to maximize (or even generate) 5(f) revenue from a 5(f) parcel. To the extent the beneficiaries of § 5(f) reap the benefits of the public trust lands, it is a consequence only of discretionary public grants or state compliance with the general statutory safeguards designed to preserve land for public use. Likewise, because adverse possession (and other statutes of limitation) do not run against the sovereign in Hawaii, see *McBryde Sugar Co. v.*

Robinson, 54 Haw. 173, 504 P.2d 1330 (1973), there is no specific mandate in state law for recovery of 5(f) land that has fallen, inadvertently or not, into use by private hands. Such recoveries would be authorized, but not mandated, by the general common law of Hawaii, as enforced by the Department of the Attorney General, which in this context has the exclusive authority to bring and prosecute civil litigation on behalf of the State.

B. The Instant Litigation.

1. The instant suit was filed in the federal District Court for the District of Hawaii in December 1985, by Respondent Mervin Napeahi, and the Sierra Club and Hawaii Audubon Society, against Petitioner Director of the Department of Land and Natural Resources, as well as the Secretary of the Army, the District Director of the Army Corps of Engineers, the Regional Administrator of the United States Environmental Protection Agency, the Director of Health of the State of Hawaii, and Transcontinental Development Company, and ATPAC Land Company, the developers and landowners of the then-proposed Waikoloa Beach Resort on the Big Island of Hawaii. Pet. App. 52. In addition to challenging the developers' proposed dredging of roughly eighty anchialine ponds along the West Hawaii Coasts as insufficiently justified under the Clean Water Act and the National Environmental Policy Act, Plaintiffs claimed the construction of the Resort would lead to "loss of approximately 2-3 acres of ceded lands which were abandoned by the state when it altered the certified shoreline of Waiulua Bay." *Id.* at 59. Napeahi alleged his standing to challenge the development arose from his status as a native Hawaiian "who has frequented the area" for the purpose of gathering "fish, opae, and other marine food products" for "subsistence purposes, to camp, and to enjoy the aesthetic, open space, marine, and terrestrial

resources of the area." *Id.* at 54. Prior to the hearing of the State Defendants' motion to dismiss, Plaintiffs voluntarily dismissed all claims but that related to the alleged "abandonment of ceded land caused by the alteration of the certified shoreline by the Department of Land and Natural Resources, use of fill land in Waiulua Bay, and the filling and future commercial use of these submerged lands by the private Defendants, without remuneration to the State." *Id.* at 64, 90. In this claim, Plaintiffs alleged that the Department of Land and Natural Resources "violated Section 5(f) of the Admissions Act, and Plaintiff Napeahi is entitled to damages from uncompensated loss of these lands." *Id.* at 64.

2. Over motions to dismiss, which sought abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), in light of the State's "extensive real property regulatory system" related to coastal zone management (Chs. 205 and 205a, Haw. Rev. Stat.), claimed that Plaintiff's "breach of trust" claim violated the Eleventh Amendment, and challenged, as contrary to established precedent holding that § 5(f) did not create a private right of action (*i.e., Keaukaha I, supra,* 588 F.2d 1216 (9th Cir. 1978)), the District Court dismissed all parties but Petitioner and allowed the filing of a Second Amended Complaint, following dicta in the Ninth Circuit's statement in *Price v. State of Hawaii,* 764 F.2d 623, 629 (9th Cir. 1985), that "the [private] enforcement of the § 5(f) compact presents a federal question under 28 U.S.C. § 1331(a)," thus reasoning that the Ninth Circuit would, under its precedents, specifically *Keaukaha-Panaewa Community Association v. Department of Hawaiian Home Lands,* 739 F.2d 1469, 1472 (9th Cir. 1984) ("*Keaukaha II*"), allow a claim for enforcement to be made under 42 U.S.C. § 1983. Pet. App. 21. Thereafter, the Sierra Club and Audubon Society dropped from the case, and the remaining parties (Petitioner and Respondent) conformed their pleadings to this ruling. Pet. App. 94-104. The case went to trial, where

Respondent lost on the ground that no 5(f) duties had ever arisen since the lands at issue had been granted in 1881 by King Kamehameha III to his wife, Queen Kalama, Pet. App. 27 (conclusion No. 8), and that, under the Hawaii Supreme Court's reading of the bounds of the State's title to submerged lands conveyed under the Equal Footing Doctrine, *In re Ashford*, 50 Haw. 314 (1968), and *County of Hawaii v. Sotomura*, 55 Haw. 176 (1973), "plaintiff has failed to meet his burden to prove that by on or before July 7, 1898, the disputed tidal pools lay below the upper reaches of the wash of the waves," and therefore had been transferred by erosion of the shoreline to the United States upon annexation. *Id.* at 27-28 (conclusion Nos. 13-14). The court also found that "[t]he instant case does not concern an inchoate property right," and therefore the 5(f) trust was not augmented in the period between annexation and Statehood under the legal theory that the right to future accretions in the scope of submerged lands belonged to the sovereign. *Id.* at 28 (conclusion No. 16 (contrasting *State v. Zimring*, 58 Haw. 106 (1977) (post-annexation lava extensions became vested in the United States prior to statehood))).

3. The court of appeals held Respondent's appeal for more than two years after argument, during which time the Ninth Circuit entertained *Price v. Akaka*, 915 F.2d 469 (9th Cir. 1990), in which the standing of native Hawaiians to sue with respect not merely to the restricted subset of 5(f) lands conveyed by the Hawaiian Homes Commission Act, *see Keaukaha II*, *supra*, but with respect to all 5(f) lands, was at issue. On September 25, 1990, the court of appeals issued its opinion in the *Akaka* case, ruling that such persons did have standing notwithstanding that state officials "may, consistently with § 5(f), spend the income [or dispose of the land] for purposes other than to benefit native Hawaiians." 915 F.2d at 471. The court reasoned that, because, as a matter of state law, native Hawaiians might be able to show constraints on

the ability of state officials, if the native Hawaiian plaintiffs "succeed[] in proving that the trustees have misappropriated § 5(f) income and must return it," the plaintiffs would be sufficiently benefitted to justify the invocation of Article III standing. *Id.* at 471 n.2. The *Akaka* panel then went further, holding that § 5(f) " 'creates a federal "right" enforceable under 42 U.S.C. § 1983' " as to all 5(f) assets. *Id.* at 472. Based on these rulings, the panel below held that Respondent, "as a native Hawaiian and beneficiary of this public trust, does have standing to enforce its provisions." *Napeahi v. Paty*, 921 F.2d 901 n.2 (Pet. App. 7). The panel below then went on to overrule the District Court's reading of the state law doctrines of accreted rights to submerged lands and held that further factfinding was necessary to determine if the lands at issue had become submerged by erosion in the period after 1898, and "before the physical alteration of the area by the property owners," and had thereby entered the 5(f) trust corpus. The court instructed the trial judge, on making the required findings, to enter "an appropriate judgment" on the equitable relief sought. *Id.* at 903-04, Pet. App. 14.

REASONS FOR GRANTING THE WRIT

The expansive federal judicial role in managing Hawaii's public trust lands charted by the courts below is not limited to the Waikaloa Beach Resort's 1.75 acres of oceanfront property, but portends the imposition of intrusive federal judicial oversight, at the behest of any private litigant with an interest in state land management, over literally millions of acres of trust lands in the Western States.[2] The Ninth Circuit's novel decision cannot be

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[2] In the Ninth Circuit alone, public land trust provisions are set forth in the admission acts of at least seven States, in

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logically limited to suits brought by native Hawaiians, or, indeed, suits involving only Hawaii's submerged lands, or even Hawaii's public trust lands. For as this Court has recognized, numerous States, upon their admission to the Union, have been granted lands for various trust purposes, and, while "[p]erhaps" "the conditions of the grants are still enforceable by the United States," it is at least doubtful whether suits "by third parties" were intended. *Papasan v. Allain*, 478 U.S. 265, 291 n.18 (1986). Permitted to stand, the judgment of the court of appeals will have, absent congressional intervention, wide-ranging, permanent effects upon the economic, social and political development of Hawaii and numerous other States.

Coming in an area where, as this Court's decisions have emphasized, State prerogatives are at their height, and "the strong presumption is against finding an intent to defeat the State's title," *Utah Division of State Lands v. United States*, 482 U.S. 193, 201 (1987), the court of appeals' judgment in this case presents an intolerable conflict with the "case-or-controversy" doctrines that state "fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Therefore, even assuming that the 1.75 acres at issue "belongs" to the 5(f) trust, as the four-Justice plurality observed in a virtually identical situation in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), given the broad discretion granted Hawaii under its Admission

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addition to Hawaii. *See* § 6(a), (f), and (j) of the Alaska Admission Act, 72 Stat. 339, 340-341 (1958), §§ 7, 8, 9, and 10 of the Arizona-New Mexico Enabling Act, 36 Stat. 557, 562-65 (1910); §§ 4-13 of the Idaho Admission Act, 26 Stat. 215, 215-16 (1890); §§ 10-13 of the North Dakota-South Dakota-Montana-Washington Enabling Act, 25 Stat. 676, 679-80 (1889); §§ 7-10 of the Nevada Enabling Act, 13 Stat. 30, 32 (1864); and § 4 of the Oregon Admission Act, 11 Stat. 383 (1859).

Act, this action's jurisdictional foundation rests on "pure speculation whether the lawsuit would result in any actual . . . relief." *Id.* at 614 (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.). As such, Article III power is lacking, and the complaint ought to have been dismissed. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

The lower court's summary treatment of the District Court's jurisdiction also overlooked the important constraints of the Eleventh Amendment. Even if those who could only speculate they would benefit from public trust lands could sue under Article III, the relief necessary to effect the goal of the suit, "a one-time restoration of the lost corpus itself," has been properly characterized by this Court as an impermissible award "of 'an *accrued* monetary liability,' " *Papasan v. Allain*, 478 U.S. at 281, and, at a very minimum, the impermissible unconsented trial of a State's "title" in a private suit in the federal courts. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 700 (1982) (plurality opinion). For this additional reason, the judgment below should be reviewed here.

Third, the judgment below, like that at issue in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), presents at the very least the question whether "courts may create rights [under 42 U.S.C. § 1983] from congressional silence only after reviewing the statute, its legislative history, and the implementing regulations to determine whether the statute is sufficiently mandatory and specific to evince a congressional intent to create privately enforceable rights," Pet. for Cert. at 6-7, No. 90-1488 (U.S. filed Mar. 20, 1991), and, indeed, presents perhaps the most compelling instance where remedies under 42 U.S.C. § 1983 were not – and should not be deemed to have been – intended by Congress. Standing

alone, § 5(f) requires only that trust lands be made available "for public use," a broad and amorphous standard that is "coterminous with the scope of a sovereign's . . . powers," *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). Likewise, to the extent the judgment rests on the particular requirements of "the constitution and laws" of Hawaii referred to in § 5(f), the decision below is equally flawed, for "there is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." *Oberlander v. Perales*, 740 F.2d 116, 119 (2d Cir. 1984). Indeed, given the history and purpose of the Admission Act, the lack of any ongoing federal financial support of Hawaii's efforts to meet its trust obligations, and the provision of a specific remedy in the statute itself, the judgment below violates both parts of this Court's two-step test to determine if statutory provisions are enforceable under 42 U.S.C. § 1983, *see, e.g., Dennis v. Higgins*, 111 S. Ct. 865, 871 (1991); *Wilder v. Virginia Hospital Association*, 110 S. Ct. 2510, 2517 (1990), and creates an anomalous expansion of liability under § 1983, one certainly never contemplated by Congress, and undoubtedly not understood as part of the terms of admission into the Union.

For this reason, and others, the lower courts also erred in failing to abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), or certify questions to the state court under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), which could moot the underlying federal issues in this case.

Certiorari should at a minimum be granted to permit an authoritative resolution of these important questions of jurisdiction and federalism, which permeate a substantial number of cases in the state and federal courts,[3] and

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[3] There are presently pending no fewer than six active suits in the state and federal courts which raise identical or related issues solely with respect to Hawaii's public trust

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which threaten disruption if not paralysis of the State of Hawaii's management of its perhaps most precious assets – its public trust lands.

I. The Ninth Circuit's Expansive Invitation to Suits Seeking To Manage Hawaii's Public Trust Lands Raises Substantial Questions Under Article III and the Eleventh Amendment Which Merit this Court's Review and Reversal.

As this Court has made clear on numerous occasions, each federal appellate court is under "a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.' " *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Although it acknowledged this precept, *see* 921 F.2d at 901 n.2, the Ninth Circuit erred on two separate, but related, fronts in concluding that the District Court could consider Respondent's trust claim.

A. The Ninth Circuit's Allowance of Land Trust "Beneficiary" Standing Conflicts With This Court's Precedents, or, at the Very Least Raises Substantial Issues that Merit Review Here.

In holding that "Napeahi, as a native Hawaiian and beneficiary of this public trust, does have standing to

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lands. In addition to this action, *see, e.g., Price v. Akaka*, No. 88-773 (D. Haw. filed Oct. 18, 1988), *remanded*, 928 F.2d 824 (9th Cir. 1991), *pet. for cert. to be filed sub nom. Akaka v. Price* (U.S. June 19, 1991); *Price v. Hawaii*, No. 89-0561 (D. Haw. filed July 21, 1989), *argued*, No. 90-15117 (9th Cir. June 11, 1991); *Naliielua v. State of Hawaii*, No. 90-63 (D. Haw. filed Feb. 2, 1990), *argued*, No. 90-15842 (9th Cir. June 10, 1991); *Kepoo v. Burgess*, No. 88-2987-09 (Haw. Cir. filed Sept. 23, 1988), *argued*, No. 14770 (Haw. June 13, 1991); *Pele Defense Fund v. State of Hawaii*, No. 89-89 (Haw. 3d Cir. filed Mar. 20, 1989).

enforce its provisions," 921 F.2d at 901 n.2, Pet. App. 7, the court below relied on notions of Article III power that have long been discredited, or which at least raise substantial issues regarding "the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

In so holding, the court relied upon its earlier decision in *Price v. Akaka*, 915 F.2d 469 (9th Cir. 1990), which in turn had relied on the " 'injury in fact' " analysis of *Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986) ("*Price I*"). In *Price I*, the Ninth Circuit, citing *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970)), adopted, in *dicta*, a broad reading of the "injury in fact" requirement, allowing claims by potential trust beneficiaries to be heard as to whether the State had violated § 5(f) in funding "other purposes than section 5(f)'s 'the betterment of native Hawaiians.' " 764 F.2d at 630. Thus, even though the court conceded native Hawaiians "have no right to any trust funds," they nonetheless had standing. *Id.*

The reasoning of the Ninth Circuit in its 5(f) cases is at odds with this Court's more recent elaboration of the "core component" of Article III standing, namely, a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Indeed, in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), four Justices (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.), joined in an opinion directly rejecting the panel's analysis as to standing:

> [E]ven if invalidation of the state law would create increased revenue for the school trust funds in the near future, an issue much disputed here, the allegations of economic harm rest on the same hypothetical assumptions as the taxpayer claims. If respondents prevailed and increased revenues from state leases were available, maybe state taxes would be reduced, or maybe the State would reduce support from

> other sources so that the money available for schools would be unchanged. "Even if the State were to devote more money to schools, it does not follow that there would be an increase in teacher salaries or benefits. These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. Whether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict. We have much less confidence in concluding that relief is likely to follow from a favorable decision here than we had in cases like *Allen v. Wright*, 48 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights, Organization*, 426 U.S. 26 (1976), where standing was found to be lacking because the probable response of private individuals to explicit tax incentives was judged to be too uncertain to satisfy . . . federal standing requirements.

490 U.S. at 614-15.

The four-Justice plurality's approach to standing in the case of Arizona's Enabling Act correctly elaborates the dictates of Article III in this important context, and the Court should grant certiorari in this case and so hold. Even if Hawaii law is relevant to Respondent's federal standing, it is clear that *no* Hawaii citizen has any claim to a particular constellation of benefits from the 5(f) corpus. Even native Hawaiians, who are the special beneficiaries of trust funds created under State law and administered by the Office of Hawaiian Affairs, *see* Haw. Rev. Stat. § 10-13.5 (Supp. 1990),[4] have no particular

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[4] As to claims by native Hawaiians, the Supreme Court of Hawaii has determined that, as of 1987, there were no

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entitlement to 5(f) funds, as the Office of Hawaiian Affairs, like any legislative body, enjoys the discretion rationally to pick and choose from among those native Hawaiian trust beneficiaries most in need of aid. As the *ASARCO* plurality states, Respondents' standing is even less suited to generating the constitutionally required "case" or "controversy" then in *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), for, in order to uphold the exercise of Article III power here, the Court must be prepared to entertain a host of suits challenging management of the Government's fiscal operations that may redound to the detriment of particular groups and individuals. This is not the law. Indeed, at the very least, the Ninth Circuit's reasoning in its 5(f) cases, namely that if a 5(f) trust breach can be shown, Respondent could show "that the returned money must be used to benefit native

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" 'judicially discoverable and manageable standards' " for determining the revenues to which OHA was entitled. *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446, *cert. denied*, 484 U.S. 898 (1987). In 1990, the Legislature redrafted OHA's enabling legislation and made changes to other parts of the statutes to clarify, prospectively, the "revenues" from 5(f) lands that are to be allocated to OHA. However, these clarifications are subject to further legislative review, and, in any case, the 1990 amendments make clear that OHA is not entitled to the maximization of revenue from 5(f) lands, nor to transfer of the title or use rights in any 5(f) land. *See* §§ 3, 7, and 9 of the Act of July 3, 1990, Ch. 304, 1990 Haw. Sess. L. 947, 948-49, 951, 952. Likewise, the 1990 amendments reaffirm OHA's discretion to create programs with 5(f) revenue that rationally exclude various groups of its native Hawaiian beneficiaries from government benefits, and thereby to deny completely to certain native Hawaiians benefits flowing from the 5(f) trust corpus. (Similar discretion is likewise retained by Petitioner with respect to 5(f) proceeds not subject to the OHA trust, i.e., Haw. Rev. Stat. § 171-18.)

Hawaiians," *see Akaka*, 915 F.2d at 471 n.2, *cited, Napeahi*, 921 F.2d at 901 n.2, is at odds with *Allen*'s rejection of this sort of "group" standing. 468 U.S. at 756. Just as litigants cannot invoke the jurisdiction of the federal courts when the likelihood of personal redress turns on contingent events in the judicial system, *see Whitmore v. Arkansas*, 110 S. Ct. 1717, 1725 (1990)[5] legal claims which depend for their constitutional concreteness on essentially legislative choices are not proper subjects of the federal judicial power.

Indeed, insofar as Respondent seeks to compel the State to take action against the private owners of the Waikoloa Beach Resort, *cf.*, 921 F.2d at 899, Pet. App. 3, *with* Second Amended Complaint at 6, Pet. App. 99-100, Respondent's suit runs into the independent rule that a private citizen has no standing regarding a State's decision to prosecute "when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Continued maintenance of this suit, and suits like it, fundamentally threatens not only State legislative, but also executive power to decline prosecution of civil claims, *see Heckler v. Chaney*, 470 U.S. 821 (1985) (on prosecutorial discretion), in conflict with Article III's concern for federalism and separation of powers principles. *See Allen v. Wright*, 468 U.S. at 760-61.

For these reasons, the Court should grant the Petition, and summarily vacate the judgment below with instructions to dismiss the complaint, or at the least grant plenary review to consider the important and recurring

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[5] The analogy to the Article III analysis in *Whitmore* is even more pronounced, since the owners of the Waikoloa Beach Resort have not been maintained in the suit, and, therefore, any remedy against them must, at the least, be reviewed further, presumably a federally compelled lawsuit for back rent or ejectment. Since the private owners are not parties, they would not be bound by any ruling here. *Martin v. Wilks*, 490 U.S. 755, 759-65 (1989).

questions of federal judicial power under Article III of the federal Constitution.

B. The Ninth Circuit's Judgment Allowing Respondent's Suit to Proceed Independently Conflicts with Settled Principles of Immunity Under the Eleventh Amendment.

In allowing Respondent to proceed further, the court below overlooked not only the mandates of Article III, but also those of the Eleventh Amendment. As this Court has noted on many occasions, the Amendment "partakes of the nature of a jurisdictional bar," *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 95 (1984) (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)). The defense of sovereign immunity embodied in the Amendment " 'need not be raised in the trial court,' " *see Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978) (per curiam), and in this instance a specific Eleventh Amendment objection was made both by answer, and motion, below. *See* Pet. App. 76, 86.

While acknowledging that the owners of the Waikaloa Beach Resort have been dismissed, and "the injunction and declaratory remedies sought by Napeahi would only affect the State in relation to the beneficiaries of the trust," 921 F.2d at 899, the court of appeals failed to appreciate that the only immediate remedy available in the absence of the private owners would be the very sort of "breach of trust" relief this Court held, in *Papasan v. Allain*, 478 U.S. 265 (1986), is impermissible under the Eleventh Amendment.[6] Just as in *Papasan*, any suit against the Director of Land and Natural Resources in his

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[6] The District Court's ruling on the motion to dismiss came on June 20, 1986, *see* Pet. App. 15, approximately twelve days before this Court handed down its decision in *Papasan*. As noted above, the failure to raise the Eleventh Amendment in the Court of Appeals does not prevent reversal here. *See Pugh, supra.*

official capacity would amount to "a substitute for the return of the trust corpus itself," *id.* at 281, and thus be jurisdictionally barred.

In addition, the judgment below is independently infected by Eleventh Amendment error insofar as Respondent's entire case depends upon the litigation of the state's title in federal court. Irrespective of whether the relief prayed for falls on the retrospective (and hence impermissible) side of the line, *see Papasan*, 478 U.S. at 278-79, such suits, even those that would, in the guise of a § 1983 claim, expand the scope of the State's claimed title, cannot be heard in federal court. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 700 (1982) (plurality opinion). Nothing in the jurisprudence of the Eleventh Amendment permits the federal courts to serve as fora for quiet title actions against the respective States. Indeed, this is particularly so when the operative issues turn on novel theories of state law. *See generally Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119-20 (1984).

Thus, even if Respondent's claims successfully hurdled Article III, the Court should independently grant review to correct the plain Eleventh Amendment defect in the judgment below.

II. The Court Should Grant Review to Correct the Court of Appeals' Expansive Reading of 42 U.S.C. § 1983 for Enforcement of the States' Trust Duties Under Their Admission Acts.

The court of appeals' judgment that it was the federal District Court's business to adjudicate Hawaii's title to the land now being used by the Waikaloa Beach Resort additionally rested on the idea "that '§ 5(f) of the Admission Act creates a federal 'right' enforceable under 42 U.S.C. § 1983,' " *Price v. Akaka*, 915 F.2d at 472, *cited*, 921 F.2d at 901 & n.2. Indeed, no other conclusion could be possible, for as this Court observed in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363

(1977), "[u]nder our federal system, property ownership is not governed by general federal law, but rather by the laws of the several States," "unless some other principle of federal law requires a different result." *Id.* at 378. In *Keaukaha I*, 588 F.2d 1216 (9th Cir. 1978), the Ninth Circuit held § 5(f) does not create a private right of action; Respondents, and the courts below, therefore relied exclusively on the later ruling in *Keaukaha II*, 739 F.2d 1467 (9th Cir. 1984), namely, that § 5(f) was enforceable, with respect to the distinct subset of 5(f) lands conferred pursuant to the Hawaiian Homes Commission Act, via § 1983. *See* 739 F.2d at 1471-72 and Pet. App. 99.

The lower courts' allowance of § 1983 suits to enforce the Admission Act with respect to all 5(f) lands presents important questions which should be reviewed by this Court. Indeed, it is dubious whether this case presents a federal question at all, for it has long been the rule that federal quiet-title actions like this are unavailable, for "a suit involving rights to land acquired under a law of the United States" does not "arise under" federal law, for, if it did, "every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws." *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912).

The issue here is, at a minimum, as compelling as those in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991). Worded more broadly than the Adoption Assistance Act, § 5(f)'s "public use" clause allows action to and including the limit of the State's constitutional power, and does *not* require obedience to "an 'objective benchmark' of an 'efficiently and economically operated facility,' " Pet. for Cert. at 14, No. 90-1488 (quoting *Wilder v. Virginia Hospital Ass'n*, 110 S. Ct. 2510, 2522-23 (1990)). Rather, " 'whether in fact the [state's action] will accomplish its objectives is not the question.' " *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984). Section 5(f) is, likewise, bereft of "legislative history indicating Congress' intent to create specific, enforceable rights." *See*

Pet. for Cert. at 15, No. 90-1488 and 588 F.2d at 1223. As did the Seventh Circuit's ruling with respect to Title IV-E of the AAA, that here "creates enforceable rights on behalf of a class of citizens for whom [Hawaii] receives not one dollar of federal reimbursement." Pet. for Cert. at 19, No. 90-1488. Needless to say, Congress did not, and has not, provided appropriations to support programs to assure that land management decisions in Hawaii maximize revenue, or, as is alleged by Respondent, do not "abandon" the trust corpus.

Although one prudent option is to hold this Petition pending decision in *Suter v. Artist M.*, review should be granted here regardless of the outcome in that case because the present expansion of § 1983 raises issues that are qualitatively more disturbing than any of the previous challenges raised by States to invoking § 1983 as a means to enforce federal statutes. For in perhaps no other area has state sovereignty, and the freedom from federal interference, been more jealously guarded by this Court than with respect to the grants of title to those lands that literally make the newly admitted States what they are.

As this Court emphasized in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), when it has come to efforts to burden a State's title to lands conveyed by admission to the Union, "the strong presumption is against finding an intent to defeat the State's title," and, thus, a court "cannot infer that Congress intended to defeat a future State's title" " 'unless the intention was definitely declared or otherwise made very plain.' " *Id.* at 201-02. While, on a superficial level, Respondent seeks to "add to," rather than "defeat" State title, fundamental notions of property as a set of entitlements to, or immunities from, judicial interference render the *Utah* presumption applicable. Indeed, the presumption against implied "reserved" federal control over state trust lands is even *more* forceful here, where lands have been granted by express language in the Admission Act rather than, as was Utah's case, by reason of the judge-made Equal

Footing Doctrine for submerged lands. As the Court observed in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1984), "it has long been established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." Id. at 475. The decision below threatens serious erosion of this fundamental legal principle.

In addressing the § 1983 enforcement problems in this context, the Ninth Circuit has lost sight of this fundamental principle in answering the two-part inquiry this Court's precedents have set forth for defining enforcement by § 1983 of statutory rights. Thus, while it may go without saying that "[a] plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement in the enactment itself,' " *Wilder v. Virginia Hospital Association*, 110 S. Ct. 2510, 2517 (1990), this Court's decisions have always answered such questions in light of the principles at stake in the particular context at issue. By ignoring the overriding considerations of state sovereignty and federalism at issue when dealing with a State's admission act, the Ninth Circuit has misinterpreted this Court's precedents, and incorrectly applied both prongs of the test for allowing § 1983 enforcement.

Thus, in ascertaining whether a statute confers "enforceable rights," this Court has first considered " 'whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." ' " *Dennis v. Higgins*, 111 S. Ct. 868, 871 (1991). Yet in determining whether such obligations were imposed this Court has found it critical whether Congress has "condition[ed] federal funding on compliance" with the directive at issue. *Wilder*, 110 S. Ct. at 2518. Even viewing this test charitably to Respondent, nothing

in the Admission Act suggests that 5(f) lands could revert to the United States in a suit brought by the United States under its enforcement power. Even more so than in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), § 1983 enforcement was not, and should not be deemed, intended, since Congress has provided *no* appropriations "to meet the enormous financial burden" of assuring the 5(f) corpus is "correctly" administered. *Wilder*, 110 S. Ct. at 2518 n.10, and Pet. for Cert. at 19-20, No. 90-1488. Likewise, in determining whether the rights at stake were " 'too vague and amorphous' to be beyond the competence of the judiciary to enforce," *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32 (1979), the Court has recognized a "critical inquiry" (*see Wilder*, 110 S. Ct. at 2517) as whether Congress has spoken so clearly that "we can fairly say that the state could make an informed choice" as to its actions. *Pennhurst*, 451 U.S. at 25. Here, all Congress has mandated under the "one or more" clause is that Hawaii devote lands to a "public use," a term that grants the broadest possible discretion, and which does not require that the land "be put into use for the general public." *Hawaii Housing Authority*, 467 U.S. at 244. Similarly, this Court has " 'asked whether the provision in question "intend[ed] to benefit" the putative plaintiff.' " *Dennis*, 110 S. Ct. at 871. Under the Ninth Circuit's own precedents, this should have required dismissal, as the general obligation of § 5(f) "does not benefit any class narrower than all citizens of Hawaii." *See* 588 F.2d at 1223.

While the "constitution and laws" of Hawaii referred to in § 5(f) undoubtedly provide more specific constraints on state officials, nothing in this Court's jurisprudence permits, as Respondent evidently contends, that such constraints are actionable under § 1983. Indeed, as the Second Circuit has held, "there is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." *Oberlander v. Perales*, 740

F.2d 116, 119 (2d Cir. 1984). At a very minimum, certiorari is justified to resolve this conflict in circuit approach to § 1983, as well as departure from the principles of *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984).

Similarly, the Ninth Circuit's conclusion that the lack of alternative private remedies requires resort to § 1983 (*see* 739 F.2d at 1471) inverts the reasons for precluding § 1983 suits when Congress has done so "in the statute itself." Indeed, it could not be more anomalous to allow citizen suits to enforce the Admission Act via § 1983, because § 1983 could not have been part of the remedial scheme when Hawaii's trust lands were administered by the United States pursuant to the Organic Act, *see Ngirangas v. Sanches*, 110 S. Ct. 1737 (1990), and, hence, there was no § 1983 suit to be "withdrawn." *Cf. Wilder*, 110 S. Ct. at 2524 & n.19 ("Congress believed that a private judicial remedy existed before passage of the Boren Amendment"); *Wright*, 479 U.S. at 423 (affirmative evidence of congressional intent that "enforcement authority is not centralized and that private actions were anticipated"). The Ninth Circuit's reasoning makes nonsense of the law, and would allow § 1983 enforcement in cases where Congress made clear it intended no private suits.

Thus, even if the lower courts had jurisdiction, the Court should grant the petition, vacate the judgment of the court of appeals, and remand with instructions to dismiss the action.

III. The Court Should Grant Review To Correct the Court of Appeals' Failure to Dismiss or Abstain Pending the State Courts' Resolution of the Underlying Ownership Issue Here.

The uncharted waters sailed by the court of appeals might never have had to have been crossed had the courts below sought to consult the Hawaii courts as to the difficult and important question concerning whether the rule of inchoate state ownership announced in *State v.*

Zimring, 58 Haw. 106, 566 P.2d 725 (1977), which dealt with the State's claims to fast land created by post-annexation lava flows, applied, and, if so, how, to changes in seaward boundaries caused by erosion of the shoreline. This central question, which the parties and the courts below properly treated as one of state law, *see Phillips Petroleum Co. v. Mississippi*, 484 U.S. at 469-84, as indicated by the diverging opinions of the District Court and the three-judge panel, is not authoritatively answered by any Hawaiian precedent, and, if answered by Hawaii's courts, could have mooted the entire case.

While the District Court rejected abstention (*see* Pet. App. at 21-22), it did so on the view only *Younger* abstention (*see Younger v. Harris*, 401 U.S. 37 (1971), was invoked. In fact, however, Petitioner emphasized that dismissal properly lay under *Burford v. Sun Oil Co.*, 318 U.S. 315 (1943)). Burford's bar on interference with administrative orders emanating from a unified regulatory scheme overseen by the state courts (namely Hawaii's shoreline certification process (Haw. Rev. Stat. Ch. 205)) was fully in play. Judicial review was available promptly under the Hawaii Administrative Procedure Act, Haw. Rev. Stat. Ch. 91, and Ninth Circuit's acceptance of Respondent's argument on the merits, which may call into doubt decisions and practices affecting hundreds of miles of shoreline in Hawaii, threatens precisely the " 'misunderstanding of local law and needless federal conflict with the state policy' " to which the *Burford* doctrine is targeted. *See Pennhurst II*, 465 U.S. at 122 n.32 (1984) (quoting *Burford*). At a very minimum, the lower court ought to have certified, pursuant to Haw. R. App. P. 13 and the rule of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), the state law question at issue. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395-96 (1988). In failing to take any step to consult the state courts, the lower courts wrongly ignored the "complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987). For this added reason, the Court should grant the petition for certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and ultimately vacate the opinion and judgment of the court of appeals and remand with instructions that the Second Amended Complaint be dismissed, or with instructions to abstain pending a certified question proceeding in the Supreme Court of Hawaii under its Appellate Rule 13.

Because of the relatedness of the second Question Presented to those at issue in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), the Court may wish to hold the Petition pending the disposition in that case. The Court may also wish itself to certify to the Supreme Court of Hawaii the question whether the court of appeals was correct in its determination of the applicability of Hawaii law to the facts of this case.

Dated: Honolulu, Hawaii, June 18, 1991.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MERVIN NAPEAHI, individually and on behalf of all those similarly situated, *Plaintiff-Appellant,* v. WILLIAM PATY, in his capacity as Director of the Department of Land and Natural Resources, State of Hawaii, *Defendant-Appellee.*	No. 87-1844 D.C. No. CV-85-1523-HMF OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Argued and Submitted
December 13, 1988 – San Francisco, California

Filed December 18, 1990

Before: Procter Hug, Jr., Thomas Tang and Alex Kozinski, Circuit Judges.

HUG, Circuit Judge:

This action concerns an alleged breach of trust by the State of Hawaii in the manner in which the state officials defined the shoreline of a parcel of privately owned real property. The State official's certification of the high water mark of the ocean waves along the shoreline of the

parcel resulted in including 1.75 acres within the boundary of the privately owned parcel, rather than as submerged land held by the State in trust for the people of Hawaii.

I. *Overview*

The State of Hawaii, under the act that admitted it to statehood, holds certain lands that were ceded to it by the United States in trust for particular uses and purposes. One of those purposes is "for the betterment of the conditions of native Hawaiians." Mervin Napeahi, in his capacity as a native Hawaiian and a beneficiary of that trust, brought this action for breach of trust against the Director of the Department of Land and Natural Resources for the State of Hawaii in his official capacity. The complaint sought injunctive and declaratory relief.

Napeahi contends that by abandoning to a private landowner approximately 1.75 acres of tidal land, which he claims is ceded trust land, the State of Hawaii has breached the trust. In contrast, the director, who is charged with the administration of the trust, maintains that the disputed area is private property rather than ceded public land. After a six-day trial, the district judge found that the area was private land and entered judgment for the director. The principal issue in this appeal is whether the district judge erred in finding that the director was correct in concluding that the area in contention is private land.

This case varies from the usual Hawaiian shoreline dispute in that it is not a contest between the State and a private landowner of sea coast land as to the seaward

boundary. In this case, the State and the landowner agree. Instead, it is a beneficiary of the ceded land trust who contends that the State erred in its determination of the seaward boundary, thus depriving the trust of a parcel of land that should have remained subject to the terms of the trust. The landowner is not a party to this action and has developed the area in question as a part of its hotel complex. Thus, the injunctive and declaratory remedies sought by Napeahi would only affect the State in relation to the beneficiaries of the trust.

II. *Historical Background*

The boundary dispute that animates this appeal depends, for its resolution, on events that transpired over a hundred years ago. Originally, all Hawaiian land was owned collectively by the people of Hawaii and held in trust for their benefit by the King. However, in the mid-nineteenth century, King Kamehameha III, responding to pressure exerted by foreign residents who sought fee title to land, undertook a dramatic reformation of the traditional system of land tenure. A vast land division, the "Great Mahele," ensued under which the King retained certain lands for his own private use, set aside other lands for the government, and distributed the remaining tracts to private individuals.

The Hawaii Supreme court has thoroughly detailed the history and procedures followed in establishing the title and boundaries of parcels of land after the Great Mahele. *See State By Kobayashi v. Zimring*, 566 P.2d 725, 729-31 (Haw. 1977). Briefly, we may summarize this as follows. An award by the King in the Great Mahele, itself,

did not transfer title. A recipient was required to apply to the Land Commission to obtain the actual award of the land. Because the number and size of the tracts of land distributed pursuant to the Great Mahele were enormous, "[n]o body of surveyors could have been found in the country or practically could have been brought [t]here, who might have surveyed these large estates within the lifetime of half the grantees." *In re Boundaries of Pulehunui*, 4 Haw. 239, 240 (1879). For this reason, and because from ancient times every portion of land found on the Hawaiian Islands had been given a name, these original transfers from the Land Commission were made in name only without a description of boundaries. After conducting a survey to procure a more precise description of the land that the grant encompassed, application could be made to the Commissioner of Boundaries to obtain a definitive determination of the scope of the award. It was only after the boundaries of the land had been surveyed and defined by the Commissioner of Boundaries that a Royal Patent could be obtained.

After the overthrow of the Kingdom of Hawaii, these Royal Patents were recognized but the Republic of Hawaii assumed title to all lands held by the government and by the King. These properties, which became public lands, included all submerged lands surrounding each island to one marine league seaward (three miles). *See Bishop v. Mahiko*, 35 Haw. 608, 642-45 (1940). Subsequently, the Republic ceded all public lands (including submerged land) to the United States pursuant to the Treaty of Annexation of 1897 and the Joint Resolution of Annexation of 1898, 30 stat. 750. Thereafter, when Hawaii became a State in 1959, these "ceded lands" (except for

certain land occupied by the United States Government) were returned to the State of Hawaii to be held in public trust for the people under the Hawaii Admission Act of 1959, Public Law 86-3, 73 Stat. 4. Section 5(f) of the Act provided in pertinent part that

> [t]he lands granted to the State of Hawaii . . . together with the proceeds from the sale of other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

One of the land transfers that occurred under the Great Mahele was an award by King Kamehameha III to his wife, Queen Kalama, of the ili of Anaehoomalu on the Island of Hawaii. (An ili is an ancient Hawaiian unit of land.) Queen Kalama followed the procedure we outlined above and was ultimately issued both a Certificate of Boundary and a Royal Patent covering the ili of Anaehoomalu grant.

III. *Facts and Procedures*

The private property owners involved in this case are successors in interest under Queen Kalama's Royal Patent. The dispute in this case centers around 1.75 acres of tidal land which Napeahi contends is not part of the private parcel of land but, instead, is "ceded land" subject to the terms of public trust under the Hawaii Admission Act.

In 1976, the Department of Land and Natural Resources for the State of Hawaii, pursuant to new regulations requiring shorelines to be certified for zoning and setback purposes, certified the shoreline at Waiulua Bay (where the tidal lands are located) indicating that the disputed tidal pond area was situated seaward of the shoreline. However, in 1984, at the urging of the holders of the Kalama Patent who wished to develop the area, the state agency recertified the shoreline concluding that the disputed tidal pond area fell landward on the coastal boundary. After successfully moving for recertification, the holders of the Kalama Patent applied for and received a dredge and fill permit authorizing development of the tidal lands. The present action originally was brought in an attempt to block blasting and dredging of the tidal pool area, but, after injunctive relief was denied, the property was graded and developed as planned. It is currently being used as part of the Hyatt Waikoloa Beach Resort Hotel.

Originally, the plaintiffs in this action complained of numerous instances of misconduct in the handling of the

disputed tidal pond area.[1] However, after their request for injunctive relief was denied, they dropped several counts and added a new count, for the first time alleging that the State's abandonment of the land to private individuals constituted a breach of Hawaii's ceded lands trust.[2] Subsequent settlement negotiations resulted in an agreement to proceed to trial in the matter solely on the breach of trust issue.

After a six-day bench trial, the district judge concluded that the disputed tidal pond area was situated within the private property boundaries of the ili of Anaehoomalu. He found that as of July 7, 1898 (the date the Joint Resolution of Annexation was approved), the tidal lands at issue were private rather than public property and therefore could not have been among the lands ceded by the Republic of Hawaii to the United States. The court reasoned that since the disputed tidal pond area is not ceded land, its use or misuse fails to implicate the public trust provisions of the Hawaii Admission Act. As a

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[1] The original complaint alleged the following: (1) failure to certify compliance with State Water Quality Standards pursuant to § 401 of the Clean Water Act; (2) violation of EPA-Corps Guidelines for issuance of a section 401 dredge and fill permit; (3) violation of the National Environmental Policy Act; (4) failure to remove illegal fill; (5) violation of the Rivers and Harbors Act; and (6) violation of the Hawaii Constitution, art. xi, § 9.

[2] Although the parties have not, in this case, raised the issue of standing to enforce the provisions of the Trust, Napeahi, as a native Hawaiian and beneficiary of this public trust, does have standing to enforce its provisions. *See Price v. Akaka*, No. 89-15169, slip. op. at 11822-23 & n.2 (9th Cir. September 25, 1990).

final matter, the district judge held that any natural change of the seaward boundary since 1898 that would have made the disputed area submerged land would not have resulted in its being subject to the terms of the ceded land trust. This appeal followed.

IV. *Interpretation of Royal Patent No. 7523*

Possession of a Royal Patent is conclusive evidence of legally cognizable private title to the Hawaiian land that it describes. *See Zimring*, 566 P.2d at 731. A district court's construction of such a document is reviewed *de novo* by the appellate courts. *See United States v. Pappas*, 814 F.2d 1342, 1343 & n.2 (9th Cir. 1987); *cf. Belcher v. Elliot*, 312 F.2d 245, 247 (6th Cir. 1962) (construction of a deed is a "legal question requiring [the] [c]ourt to interpret the meaning of the words . . . contained in the deed"). The underlying factual determinations upon which the construction is based, in contrast, are reviewed for clear error. *See Pappas*, 814 F.2d at 1343 n.2.

King Kamahameha awarded the ili of Anaehoomalu to his wife, Queen Kalama, During the Great Mahele in 1848. Thereafter, in 1854, the Land Commission awarded her the land in name only. It was not until 1880, over 30 years later, that the land was first surveyed in an attempt to establish a more precise description of its boundaries. The task of surveying the Anaehoomalu grant fell to J.S. Emerson and resulted in the creation of a set of field notes which contains a metes and bounds description of all of the property's boundaries, including the disputed shoreline boundary. Emerson also prepared a map that reproduces pictorially his conclusions regarding the ili's

parameters. Interestingly, the map itself contains two written descriptions of the parcel's limits which, while they specifically refer to the land boundaries in terms of metes and bounds, do not describe the shoreline boundary so precisely, stating instead that this borderline can be located "along the seacoast at high water mark."

In 1881, both the field survey notes and the map prepared by Emerson were submitted to the Commissioner of Boundaries for the Island of Hawaii so that a definitive determination of the boundaries of the ili of Anaehoomalu could be made. After considering the notes and map provided by Emerson, and correcting one land boundary in order to resolve a dispute with an adjacent landholder, the Commissioner issued Certificate of Boundary No. 131 covering the Anaehoomalu grant. With the one minor exception mentioned above, this certificate expressly adopts the metes and bounds descriptions of the land boundaries that were generated by Emerson's survey. Rather than specifically endorsing Emerson's metes and bounds description of the shoreline, however, the Certificate of Boundary refers to the parcel's seaward border only in general terms as existing "along the seacoast at high water mark." A Royal Patent covering the ili of Anaehoomalu was issued later that year by the Minister of Interior of the Kingdom of Hawaii to Queen Kalama. It contains a description of the ili's boundaries that is identical to the one found in the earlier Certificate of Boundary.

There was considerable dispute at trial as to whether the certification of the Commissioner and, in turn, the Royal Patent, actually incorporated Emerson's metes and bounds description of the shoreline or whether the patent

simply left the seaward boundary to be defined as the high water mark. Although the metes and bounds were not actually incorporated in the wording of certification and the Royal Patent, the map and the description filed with the office are significant evidence that those metes and bounds delineated the high water mark at that time.

The Hawaii Supreme Court noted in *In Re Application of Ashford*, 440 P.2d 76 (Haw. 1968), that "Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. The method of locating the seaward boundaries was by reputation evidence from Kamaainas and by the custom and practice of the government's survey office."[3] *Id.* at 77 (citation omitted). The court noted that it was the practice for the Kamaainas who knew and lived in the area to go on the land with the government surveyors and point out the boundaries. The supreme court held "that according to ancient tradition, custom and usage, the location of a public and private boundary dividing private land and public beaches was long the upper reaches of the waves as represented by the edge of vegetation or the line of debris." *Id.* at 78.

There is ample basis to conclude that the location of the seaward boundary, as reflected in government surveyor Emerson's metes and bounds description, was the high water mark derived in the traditional Hawaiian manner and, therefore, the seaward boundary. Thus, we find no error in the district court's determination that, at the time the public land was ceded by the Republic of

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[3] A Kamaaina is generally defined as "a person familiar from childhood with any locality." *Ashford*, 440 P.2d at 77 n.2.

Hawaii to the United States in 1898, it did not include the 1.75 acres in contention.

V. *Change in Shoreline*

The determination of the shoreline boundary as it existed in 1898 does not, however, end the inquiry. We must determine whether the State has acquired additional submerged land since 1898, and if so, whether it became part of the ceded land and, thus, subject to the terms of the public trust provisions of the Hawaii Admission Act.

The Hawaii Supreme Court has held that the seaward boundary of ocean front property can change through erosion, resulting in the State acquiring title to the newly eroded submerged lands. *County of Hawaii v. Sotomura*, 517 P.2d 57, 61 (1973), *cert. denied*, 419 U.S. 872 (1974). The court stated that "the precise location of the high water mark on the ground is subject to change and may always be altered by erosion." *Id.* The court held that, when the seaward boundary changes inland by erosion, the State owns and may obtain title to the additional submerged land that results. *Id.*

The Royal Patent to the parcel of property here in question described the seaward boundary as located "along the seacoast at high water mark." Under the holding of *Sotomura*, that boundary can change through erosion and result in an addition to the submerged public land. There was conflicting evidence at trial as to whether this had occurred.

A secondary question exists, however. Even assuming that the seaward boundary has changed since 1898,

resulting in additional state owned submerged land, does this constitute "ceded" land subject to the trust? The director argues that land which became submerged since 1898 could not be "ceded" land because it was not then part of the public land ceded to the United States, and only this "ceded" land was returned to Hawaii to be held in trust.

The Hawaii Supreme Court dealt with a similar problem in *Zimring*. In that case, the issue was over the title to land that had been newly created on the seashore as a result of a lava flow. The court, after carefully reviewing the history of Hawaiian land law, concluded that this was ceded land subject to the terms of the public trust. 566 P.2d at 739. The district court in the case before us concluded that the *Zimring* case was inapplicable to this case because it involved land created by a lava flow, not submerged land created by erosion. However, the reasoning of the Hawaii Supreme Court in *Zimring* is equally applicable here. The supreme court noted that according to the terms of the Joint Resolution of Annexation, the Republic of Hawaii ceded to the United States

> The absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and *all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.*

Id. at 735-36 (emphasis in original). The supreme court held that the property ceded included both choate and inchoate property, nothing that Article 15 of the Republic's constitution described the territory of the Republic as including territory that "may hereafter be added to the

Republic." *Id.* at 736. The court went on to hold that the Republic voluntarily chose to cede all its property interests and this included the right to future lava extensions. The court stated:

> Since the right to future lava extensions was conveyed to the United States at the time of annexation, any lava extension thereafter created should be considered to be among the "lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation." [Admission Act § 5(g)]. Such land passed to the State of Hawaii pursuant to section 5(b) of the Admission Act. The State thus obtained title to the disputed lava extension upon admission in 1959.

Id.

There is no reason to distinguish the inchoate property interest in submerged land that could be acquired by a lava extension. Both were inchoate property interests which *Zimring* held to be property that was ceded to the United States and then returned to the State in 1959. Thus, the holdings in *Sotomura* and *Zimring* require us to conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then the property would be ceded lands subject to the terms of the trust.

There was conflicting evidence presented at trial as to whether the 1.75 acres that was included within the privately owned parcel in 1898 later became submerged land through a natural erosion of the seashore. The district judge did not make a factual finding on this issue because he concluded that if the property in question was

within the private property boundary in 1898, then it could not become property subject to the terms of the trust thereafter. This conclusion does not accord with the Hawaii Supreme Court's rulings in *Sotomura* and *Zimring*. Thus, we must remand the case to the district court for a finding on whether the acreage in question naturally became submerged land by erosion within the meaning of *Ashford*, *Sotomura*, and *Zimring* after 1898 and before the physical alternation of the area by the property owners. If it did, then it would have become land subject to the terms of the trust and the land would have been improperly abandoned in violation of the terms of the trust. If not, then it remained private land and there was no breach of trust.

The case is remanded to the district court for the required findings and, based upon those findings, an appropriate judgment on the declaratory and injunctive relief sought by Napeahi.

AFFIRMED in part, and REMANDED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, SIERRA CLUB, and HAWAII AUDUBON SOCIETY,	)	CIVIL NO. 85-1523
Plaintiffs.	)	
vs.	)	
JOHN O. MARSH, in his capacity as the secretary of the Army, et al.	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' MOTION TO AMEND THE FIRST AMENDED COMPLAINT

(Filed June 20, 1986)

At a hearing on Tuesday May 27, 1986, the following motions were heard by this court:

Plaintiffs' Motion filed April 29, 1986 to Amend the First Amended Complaint;

Defendant Transcontinental Development's & Defendant Atpac's Motion filed March 21, 1986 to Dismiss Count I and II and Motion for Summary Judgment on all counts except Count IV;

Defendants Transcontinental Development and Atpac Land Co. and Matsubara and Ono's Joint Motion filed March 12, 1986 to Dismiss Count IV of the First Amended Complaint and for Sanctions;

Federal Defendants' Motion filed on March 25, 1986 to Dismiss &/or for Summary Judgment on all Counts;

Defendants Matsubara and Ono's Motion filed March 20, 1986 to Dismiss the First Amended Complaint.

The following counsel appeared for the parties at this hearing: Alan T. Murakami & Livia Wang for plaintiff Mervin Napeahi; Lisa Woods Munger for defendant Transcontinental Development Co. and Atpac Land Co.; Flo Nakakuni for the defendant John O. Marsh, Col. Michael M. Jenks, Lee Thomas and Judith Ayers; Chelun Huang & Edward P. Watson, for defendant Susumu Ono as Chairperson of the Hawaii Dept. of Land and Natural Resources.

The court having considered the memoranda of law in support of the above listed motions and in opposition thereto, the arguments of counsel, as well as the records and files of this case, finds as follows:

Plaintiff Mervin Napeahi is allegedly a native Hawaiian and a beneficiary of the ceded land trust established by Section 5(f) of the Admission Act. Napeahi, the Sierra Club, and the Hawaii Audubon Society, filed this suit on December 20, 1985.

The parties have agreed to dismiss all counts except the fourth claim. The stipulation was filed on May 19, 1986.

Napeahi alleges that he has been injured by the abandonment of ceded land caused by the alteration of the certified shoreline by the Department of Land and Natural Resources as well as by the uncompensated loss of the submerged land beneath the fill placed in Wailulua

Bay and further commercial use of the area by the private defendants without payment to the State.

I

F.R.C.P. Rule 15(a) provides that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The Ninth Circuit has consistently held that "Rule 15's policy of favoring amendments to pleadings should be applied with extreme liberality." *United States v. Webb*, 655 F.2d 977 (9th Cir. 1981).

The Supreme Court has interpreted the phrase "when justice so requires," declaring that leave to amend should be "freely given" in the absence of "undue delay, bad faith or dilatory motive on the part of the movant." *Foman v. Davis*, 371 U.S. 178, 182 (1972). The granting or denial of such leave lies within the discretion of the District Court.

The Ninth Circuit has stated that "[s]everal factors govern the propriety of a motion under Rule 15: (1) undue delay, (2) bad faith, (3) futility of amendment, and (4) prejudice to the opponent. *Loehr v. Ventura County Community College District*, 743 F.2d 1310, 1319 (9th Cir. 1984).

Delay alone is an insufficient ground for denying leave to amend. *Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir. 1973). The party opposing the motion to amend must show futility of amendment, bad faith or prejudice in order to prevail.

While the plaintiffs filed this motion to amend six months after filing their original complaint, delay alone is not sufficient grounds for denying leave to amend. In *Howey v. United States*, 481 F.2d 1187 (9th Cir. 1973) the Ninth Circuit held that leave to amend should not be denied even if *five years* had gone by since the original pleadings, where neither bad faith nor prejudice was apparent.

The defendants have not presented any evidence showing that the plaintiffs' failure to amend earlier was due to bad faith. Similarly, although defendant Matsubara has argued that he would be prejudiced by the amendment, he has not brought forward any evidence of the specific nature of the claimed prejudice. Finally, amending the complaint to include a claim under 42 U.S.C. § 1983 would not be futile.

Applying the law in the Ninth Circuit articulated in *Loehr* and in *Howey*, the court hereby GRANTS IN PART the plaintiffs' Motion to Amend their Complaint as to Count IV so that the plaintiff may file a Second Amended Complaint which alleges a cause of action under 42 U.S.C. § 1983 against defendant Ono.

Because the acts plaintiffs complain of in Count IV do not involve defendant Matsubara, it would be futile to allow the amendment to the complaint to include the proposed paragraph 3 in the prayer for relief. Therefore, as to that paragraph, and in all other respects aside from the amendment of Count IV, the motion is DENIED IN PART.

The plaintiffs are ordered to file a Second Amended Complaint in a form consistent with this order.

II.

The Motion to Dismiss filed on March 21, 1986 by Defendant Transcontinental Development and Atpac is now moot because it did not address Count IV, the only count remaining after the stipulation filed on May 16, 1986.

III

The Motion to Dismiss Count IV filed by defendants Transcontinental Development Co., Atpac Land Co., Matsubara and Ono on March 12, 1986, will be considered next.

In considering a motion to dismiss under F.R.C.P. Rule 12(b)(6), the general rule is that a complaint should not be dismissed on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Gillespie v. Civiletti*, 629 F.2d 637 (9th Cir. 1980); *California ex. rel. Yonger v. Mead*, 618 F.2d 618, 620 (9th Cir. 1980).

In evaluating the plaintiffs' second amended complaint, any doubts should be construed in favor of the plaintiffs. *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 834-36 (9th Cir. 1980). The complaint must be liberally construed, giving the plaintiffs the benefit of all proper inferences. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

The Ninth Circuit has held that the enforcement of section 5(f) of the Admission Act presents a federal question subject to the original jurisdiction of this court under

28 U.S.C. § 1331. *Price v. State of Hawaii*, 764 F.2d 623, 629 (9th Cir. 1985).

After the stipulation filed on May 19, 1986, the only Count remaining in this action is Count IV. Even liberally construing the complaint, the court finds that the second amended complaint does not state a cause of action against the defendant developers, Transcontinental and Atpac. Therefore, the complaint will be DISMISSED WITH PREJUDICE as to those two defendants.

IV

The Motion for Sanctions filed by defendants Transcontinental Development Co., Atpac Land Co., Matsubara and Ono on March 12, 1986 will now be considered.

Although the plaintiffs would have been better advised to have included 42 U.S.C. § 1983 in their original claim for enforcement of section 5(f) of the Admission Act, the court does not view their failure to do so as grounds for sanctions. The motion for sanctions is DENIED.

The court now turns to the Federal Defendants' Motion to Dismiss and/or for Summary Judgment filed on March 25, 1986.

After the stipulation filed on May 19, 1986, the only Count remaining on this action is Count IV. Even liberally construing the complaint, the court finds that the second amended complaint does not state a cause of action against the federal defendants, John O. Marsh, Col. Michael M. Jenks, Lee Thomas, and Judith Ayres. Therefore,

the complaint will be DISMISSED WITH PREJUDICE as to those four defendants.

VI

Defendant Matsubara's and Ono's March 20, 1986 Motion to Dismiss Count IV of the First Amended Complaint.

Because Count IV is the only remaining count in the complaint, and because that Count does not involve defendant Matsubara, it is hereby ordered that the complaint be DISMISSED WITH PREJUDICE as to defendant Matsubara.

The complaint does raise a federal question under Section 5(f) of the Hawaii Admission Act, a federal statute. In the 1984 *Keaukaha II*, the Ninth Circuit held that a violation of § 5(f) is a violation of federal law. *Keaukaha-Panawea Community Association v. Department of Hawaii Home Lands*, 739 F.2d 1469, 1472 (9th Cir. 1984).

In the latest case directly on point the Ninth Circuit held that a group of native Hawaiians had a private right of action under 42 U.S.C. § 1983 to enforce the provisions of section 5 of the Admission Act. *Keaukaha II* at 1472.

In its opinion in *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), the Ninth Circuit did not address the question of whether the plaintiffs had a private right of action under 42 U.S.C. § 1983. Therefore, *Keaukaha II* remains the current Ninth Circuit authority on point.

The recent Ninth Circuit decision, *Martori Bros. v. James-Massengale, et al.*, 84-6137, 84-6274, 84-6275 (April 1,

1986) is dispositive of defendant Ono's abstention argument. After noting that "abstention from the exercise of federal jurisdiction is the exception, not the rule" (quoting *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321, 2327-28 (1984)) the court in *Martori Bros.* held that a federal court should abstain under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) only if one of three vital state interests is present: a state criminal proceeding, or a proceeding closely related to a criminal proceeding, or a proceeding involving the fundamental operation of the state court system. *Martori Bros.*, (slip op. at 12-13.)

Because the case at bar does not involve any of the vital state interests recognized by the Ninth Circuit in *Martori Brothers*, this court will not exercise its right of abstention.

The State does not have sovereign immunity under the eleventh amendment since, according to the court's reading of the complaint and the representations made in court by plaintiffs' counsel, the complaint seeks only declaratory and injunctive relief.

Therefore, defendant Ono's motion to dismiss should be and hereby is DENIED.

DATED: Honolulu, Hawaii, JUN 20 1986

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,	)	CIVIL NO. 85-1523
Plaintiff,	)	
vs.	)	
SUSUMU ONO, in his capacity as Director of the Department of Land and Natural Resources, State of Hawaii,	)	
Defendant.	)	

DECISION AND ORDER

(Filed Oct. 20, 1986)

The above-titled matter came in for non-jury trial before this Court on September 5, 1986. Alan Murakami and Livia Wang appeared on behalf of plaintiff. Edwin Watson and Chelun Huang appeared on behalf of defendant. The Court, having considered the stipulated facts and the exhibits, having heard the testimony of the witnesses, and being fully advised as to the premises herein, finds as follows:

FINDINGS OF FACT

1. In 1848, Kamehameha III awarded the Ili of Anaehoomalu, situated at Kohala on the Island of Hawaii, to H. Kalama under the Great Mahele.

2. On May 20, 1854, the Land Commission awarded Land Commission Award 4452, Apana 4, to H. Kalama. The Ili of Anaehoomalu was awarded in name only with no specific metes and bounds description of the parcel.

3. In October 1880, J.S. Emerson first surveyed and established by metes and bounds description the boundary of the Ili of Anauhoomalu.

4. Field Book Reg. No. 312, filed in the Survey Division of the Department of Accounting and General Services of the State of Hawaii, contains the original metes and bounds survey description and field survey notes of Emerson's 1880 survey of the boundaries of the Ili of Anaehoomalu.

5. In his 1880 survey, Emerson located and plotted fourteen survey points along the shoreline boundary of the Ili of Anaehoomalu.

6. In December 1880, Emerson prepared a map delineating the boundaries of the Ili of Anaehoomalu. The map is entitled "Lahuipuaa and Anaehoomalu." The original map of Lahuipuaa and Anaehoomalu, prepared by Emerson in December 1880, is also identified as Government Registered Map 824. Government Registered Map 824 is on file in the Survey Division of the Department of Accounting and General Services of the State of Hawaii.

7. The depiction of the shoreline boundary of Ili of Anaehoomalu on Government Registered Map 824, prepared by Emerson in 1880, conforms with and correctly plots the metes and bounds description of Emerson's field survey notes contained in Field Book No. 312.

8. In 1881, the metes and bounds survey description of the Ili of Anaehoomalu and the map delineating the boundaries of the Ili of Anaehoomalu, both prepared by Emerson in 1880, were submitted to the Boundary Commissioner for the Island of Hawaii for a determination of the boundaries of the Ili of Anaehoomalu. A portion of the common boundary between the Ili of Anaehoomalu and the Ili of Waikoloa was corrected, and the total area of the Ili of Anaehoomalu was corrected from approximately 879 acres to approximately 866 acres.

9. On January 24, 1881, F.S. Lyman, the Boundary Commissioner for the Island of Hawaii, issued Certificate of Boundary No. 131. Certificate of Boundary No. 131 covered the Land of Anaehoomalu, District of Kohala, Island of Hawaii. The Certificate of Boundary was based upon Emerson's 1880 survey of the Ili of Anaehoomalu, as corrected by the Boundary Commission.

10. On February 2, 1881, Royal Patent No. 7523, Apana 4, was issued to H. Kalama. Royal Patent No. 7523 adopted the description of the Ili of Anaehoomalu provided in Certificate of Boundary No. 131.

11. Royal Patent No. 7523 situated the disputed tidal pools within the private property boundaries of the Ili of Anaehoomalu.

12. On July 7, 1898, the tidal pools were part of the private property comprising the Ili of Anaehoomalu.

CONCLUSIONS OF LAW

1. On May 20, 1854, Land Commission Award 4452, Apana 4, conveyed title to the Ili of Anaehoomalu to H. Kalama.

2. Section 5(f) of the Admission Act creates a ceded land trust.

3. Section 5(f) of the Admission Act defines "ceded lands" to include "[t]he lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom. . . . "

4. Section 5(b) lands include "all the public lands and other public property . . . within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union."

5. Section 5(g) of the Admission Act defines "public lands and other public property" as "the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded."

6. Thus, the ceded lands of section 5(b) of the Admission Act are defined as the lands and properties ceded to the United States by the Republic of Hawaii on July 7, 1898.

7. In *Mist v. Kawelo*, the Hawaii Supreme Court held that a royal patent is a quit claim of the government's interest in lands. 11 Haw. 587, 589 (1898).

8. By issuing Royal Patent 7523 to H. Kalama on February 2, 1881, the government relinquished any legal interest in the disputed tidal pools.

9. On July 7, 1898, the disputed tidal pools were private property and not part of the section 5(b) lands that were ceded to the United States by the Republic of Hawaii.

10. In 1968, the Hawaii Supreme Court determined that the beachfront title line is along the "upper reaches of the wash of waves, usually evidenced by the edge of the vegetation or by the line of debris left by the wave of waves." *In re Ashford*. 50 Haw. 314, 315 (1968).

11. Using the *Ashford* test, the Court later found that the seaward boundary could be altered as a result of erosion. *County of Hawaii v. Sotomura*, 55 Haw. 176 (1973).

12. The *Ashford* decision has no retroactive effect, because "[p]roperty rights are determined by the law in existence at the time such rights are vested." *Ashford*, 50 Haw. at 317.

13. Even assuming, arguendo, that the *Ashford* decision can be applied retroactively, plaintiff has failed to meet his burden to prove that by on or before July 7, 1898, the disputed tidal pools lay below the upper reaches of the wash of the waves.

14. Therefore, notwithstanding *Ashford*, the disputed tidal pools were private property and were not

part of the lands and properties that were ceded to the United States in 1898.

15. In *State v. Zimring*, 58 Haw. 106, 123 (1977), the Hawaii Supreme Court expanded the definition of ceded lands to include lava extensions that were not in existence in 1898. In *Zimring*, a volcanic eruption in 1955 overflowed the shoreline and extended it, creating approximately 7.9 acres of new land. The State of Hawaii sought to quiet title in itself in the new land. The Hawaii Supreme Court held that the lava extensions were both public and ceded lands. The Court held that "the Republic [of Hawaii] chose to cede and voluntarily quitclaim all of its property interests including its right to, and interest in, any future lava extensions." *Id.* at 123.

16. *Zimring* is inapposite to the case at bar. In *Zimring*, the Hawaii Supreme Court addressed the issue of whether or not lava extensions created subsequent to 1898 constituted ceded lands. The Court held affirmatively. The instant case does not concern an inchoate property right such as a future lava extension.

17. Assuming, without deciding, that the disputed tidal pools became public lands in 1968 or subsequently as a result of the *Ashford* decision, the lands did not become ceded lands.

18. The disputed tidal pools were not ceded to the United States in 1898 and subsequently did not become ceded lands. Thus finding, the Court need not decide the issue of whether or not the disputed tidal pools are public lands as a result of the *Ashford* decision.

19. In light of the Court's finding that the disputed tidal pools are not ceded lands, Susumu Ono did not breach any fiduciary duty he might have had in his official capacity under Section 5(f) of the Admission Act.

20. Judgment is entered in favor of defendant and against plaintiff.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 20 1986

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

V.

SUSUMU ONO, in his capacity as director of the Department of Land and Natural Resources, State of Hawaii

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 85-1523

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of defendant and agianst plaintiff.

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

OCT 20 1986

at 3 o'clock and ___ min. PM.
WALTER A. Y. H. CHINN, CLERK

cc: all parties of record

Oct. 20, 1986
Date

/s/ Walter A. Y. H. Chinn
Clerk

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, individually and on behalf of all those similarly situated, Plaintiff, vs. SUSUMU ONO, in his capacity as Director of the Department of Land and Natural Resources, State of Hawaii, Defendant,	CIVIL NO. 85-1523

ORDER DENYING PLAINTIFF'S MOTION TO AMEND JUDGMENT, DECISION AND ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Feb. 3, 1987)

The above-titled matter came on for non-jury trial before this court on September 5, 1986. On October 20, 1986, this court entered its decision and order in this case. Plaintiff now moves pursuant to Fed. R. Civ. P. 59(e) and 60(b) to have this court amend the judgment, decision and order, findings of fact and conclusions of law.

Plaintiff makes several arguments in favor of this motion to amend the court's decision. The court will address each argument in turn. First, plaintiff argues that Royal Patent 7523 does not situate the tidal pools within the private property boundaries of the Ili of

Anaehoomalu. Plaintiff argues that the court cannot rely on a private survey map to determine the seaward boundary of the ili. The court disagrees and herein articulates its decision in this case to clear up any confusion that might exist.

In the 1840's, King Kamehameha III reformed the traditional system of land tenure and instituted a regime of private title. *State v. Zimring*, 58 Haw. 106, 111 (1977).

In 1846, the Board of Commissioners to Quiet Land Title, known as the Land Commission, was created for the "investigation and final ascertainment or rejection of all claims of private individuals." *Id.* The Land Commission also was empowered to make Land Commission Awards. *Id.* Upon presentation of commutation by the awardee to the government, the Minister of Interior was authorized to issue Royal Patents upon such awards. *Id.*

In 1848, as part of the Great Mahele or "division", Kamehameha III awarded the Ili of Anaehoomalu, situated at Kohala on the Island of Hawaii, to H. Kalama. The land was awarded in name only; such a grant of property was intended to assign "whatever was included in such tract according to its boundaries as known and used from ancient times." *In the Matter of the Boundaries of Pulehunui*, 4 Haw. 239, 240 (1879). "The Mahele agreements were essentially reciprocal quitclaims and did not convey title. Detailed claims had to be presented to the Land Commission for formal Land Commission Awards." *Id.* at 112.

On May 20, 1854, the Land Commission awarded Land Commission Award 4452, Apana 4, to H. Kalama. Through this award, the Land Commission awarded to H.

Kalama the Ili of Anaehoomalu in name only with no specific metes and bounds description of the parcel.

Before a Royal Patent could be issued on this land, however, the boundaries had to be ascertained and a boundary certificate issued. *Territory of Hawaii v. Liliuokalani*, 14 Haw. 88, 94 (1902). Therefore, in October 1880, J.S. Emerson surveyed and established by metes and bounds description the boundary of the Ili of Anaehoomalu. Field Book Reg. No. 312 contains the original metes and bounds survey description and field survey notes of this survey. In his survey, Emerson located and plotted fourteen (14) survey points along the shoreline boundary of the Ili of Anaehoomalu.

In December 1880, Emerson prepared a map delineating the boundaries of the Ili of Anaehoomalu. The map, identified as Government Registered Map 824, is on file in the Survey Division of the Department of Accounting and General Services of the State of Hawaii. The depiction of the shoreline boundary of the Ili of Anaehoomalu on Government Registered Map 824 conforms with and correctly plots the metes and bounds description of Emerson's field survey notes contained in Field Book No. 312.

In 1881, the metes and bounds survey description of the Ili of Anaehoomalu and the map delineating the boundaries of the Ili of Anaehoomalu, both prepared by Emerson in 1880, were submitted to the Boundary Commissioner for the Island of Hawaii for a determination of the boundaries of the Ili of Anaehoomalu. A portion of the common boundary between the Ili of Anaehoomalu and the Ili of Waikoloa was corrected, and the total area

of the Ili of Anaehoomalu was corrected from approximately 879 acres to approximately 866 acres.

On January 24, 1881, F.S. Lyman, the Boundary Commissioner for the Island of Hawaii, issued Certificate of Boundary No. 131. Certificate of Boundary No. 131 covered the Land of Anaehoomalu, District of Kohala, Island of Hawaii.

On February 2, 1881, Royal Patent No. 7523, Apana 4, was issued to H. Kalama.

The court found that Royal Patent No. 7523 adopted the description of the Ili of Anaehoomalu provided in Certificate of Boundary No. 131. The court further found that Certificate of Boundary No. 131 was based upon Emerson's 1880 survey of the Ili of Anaehoomalu, as corrected by the Boundary Commissioner. Based upon these findings, the court held that Royal Patent No. 7523 situated the disputed tidal pools within the private property boundaries of the Ili of Anaehoomalu.

Plaintiff takes issue with these findings and argues that a survey is the mere opinion of a surveyor and cannot be regarded as evidence of the shoreline absent proof that it is based on kamaaina testimony of the ancient boundary. In support of this argument, plaintiff cites *In the Matter of the Boundaries of Pulehunui*, 4 Haw. 237 (1879). This case, decided by the Hawaii Supreme Court in 1879, concerns a boundary dispute between the owners of two adjoining parcels of land. The owner of the ahupuaa of Pulehunui submitted an application to the Boundary Commission. Based upon the description notes and map of a certain survey made on behalf of the petitioner, the Boundary Commissioner agreed to issue a

boundary certificate. The owners of an adjacent parcel of land appealed the Boundary Commissioner's decision. The Hawaii Supreme Court affirmed the Boundary Commissioner on the basis that the metes and bounds survey conformed to the ancient boundaries of the parcel. The Hawaii Supreme Court stated that:

> [A survey is] [n]othing but the opinion of the surveryor, on whatever grounds he may have derived it, that such and such were the boundaries of the land. . . . [I]t is apparent that no survey, even one founded on good information, can be anything more than secondary evidence when it has been proved to have been so founded, and can be no evidence in itself without proof that it is the expression of original kamaaina direction.

Id. at 251.

The Hawaii Supreme Court then evaluated the testimony of a number of kamaaina witnesses who had personal knowledge of the area and the ancient boundaries. Based upon this testimony, the Hawaii Supreme Court was satisfied that the survey conformed to the ancient boundaries.

As in *Pulehunui,* H. Kalama applied for a boundary certificate and retained Emerson to conduct a survey in connection with this application. At the time of the petition for the boundary certificate, an appeal could have been made if any party felt that the metes and bounds survey did not conform to the ancient boundaries. Such an appeal would have given kamaainas an opportunity to testify as to their understanding of the ancient boundaries of the Ili of Anaehoomalu. In fact, it appears that such an appeal was made since the boundaries were

"corrected" before the boundary certificate was issued. Based upon the revised boundary delineation, the Boundary Commissioner issued a boundary certificate. Although the court agrees that a survey is merely secondary evidence, the Boundary Commissioner's issuance of the boundary certificate satisfies this court that the survey, as corrected, conforms to the ancient boundaries, as required by the Hawaii Supreme Court in *Pulehunui*. Furthermore, the court finds that the Royal Patent No. 7523, issued upon grant of the boundary certificate, adopted the description of the Ili of Anaehoomalu provided in Certificate of Boundary No. 131. Therefore, the court again finds that the disputed tidal pools lie within the private property boundaries of the Ili of Anaehoomalu.

Second, plaintiff argues that the *Ashford* definition of the shoreline is merely a reaffirmation of the traditional definition of shorelines, and did not create new state property rights in 1968. Plaintiff then argues that if the tidal pools lay before the highest wash of the waves in 1898, the tidal pools were public land under the *Ashford* definition and thus were ceded to the United States. Plaintiff argues that all land in Hawaii is presumed to be public land unless proven otherwise. Plaintiff argues that since Royal Patent No. 7523 does not specifically include the disputed tidal pools, this area remained in the public domain. Plaintiff further argues that defendant had the burden to show that the Emerson survey delineated the shoreline in accordance to the *Ashford* standard, i.e. the highest wash of the waves. Plaintiff argues that no such showing was made. Therefore, the disputed tidal ponds remained in the public domain.

Assuming, without deciding, that the holding in *Ashford* can be applied retroactively, the court would agree that the tidal pools are ceded lands if they did lay below the highest wash of the waves in 1898. The court also agrees that:

> land in its original state is public land and if not awarded or granted, such land remains in the public domain. To establish legally cognizable private title to land in the great majority of cases, one must show that he or a predecessor-in-interest acquired a Land Commission Award, a Royal Patent, a Kamehameha Deed, a Grant, a Royal Patent Grant, or other government grant for the land in question.

State v. Zimring, 56 Haw. at 114.

In the instant case, however, defendant demonstrated by a preponderance of the evidence that tidal pools were part of the property conveyed to H. Kalama and her descendants through Royal Patent No. 7523. The fact that the Royal Patent does not *specifically* refer to the tidal pools does not persuade this court that they were not included as part of the transfer. *See In re Cecelia Keohokalani Kamakana*, 58 Haw. 632, 637 (1978). Since the court found that defendant met his burden to demonstrate that the tidal pools were within the private property boundaries of the Ili of Anaehoomalu, defendant overcame the presumption that the tidal pools were public lands.

If, as plaintiffs argue, *Ashford* applies in this case, the court agrees that the tidal pools would be ceded lands if they did lay below the highest wash of the waves in 1898. However, since defendant overcame the presumption that the tidal pools were private property, plaintiff has the

burden to demonstrate that the pools fell back within the public domain by virtue of their position below the highest wash of the waves in 1898. The court is not persuaded that plaintiff proved this by a preponderance of the evidence. Mervin Napeahi, a kamaaina who lives in the area, testified as to his knowledge of the area. Napeahi's testimony, however, dates back only to 1945 and provides the court with no evidence as to the position of the tidal pools in 1898. Richard Moore, a geologist, did testify that there has been little change in the topography of the area over the last 100 years. However, the court was not persuaded by Moore's testimony, because he did not provide the court with the data upon which he based his opinion. The court finds that Moore's testimony, without the underlying data upon which he relied, is insufficient to establish the position of the tidal pools in 1898. Accordingly, the court finds that plaintiff did not meet his burden to establish that the tidal pools lay below the highest wash of the waves in 1898.

Therefore, the court reaffirms its finding that the disputed tidal pools are not ceded lands. Since the tidal pools are not ceded lands, defendant Susumu Ono did not breach any fiduciary duty he may have had in his official capacity as the director of the Department of Land and Natural Resources of the State of Hawaii.

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that plaintiff's Motion to Amend

Judgment. Decision and Order, Findings of Fact and Conclusions of Law is DENIED.

DATED: Honolulu, Hawaii, FEB 3 1987

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NUI LOA PRICE, Dr., aka Maui Loa, individually and in capacity as chief of Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; KAMUELA PRICE, individually and in his capacity as member of elder council of the Hou Hawaiians, *Plaintiffs-Appellants,* v. MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUIS HAO et al., *Defendants-Appellees.*	No. 89-15169 D.C. No. CV-88-0773 DAE OPINION

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
May 16, 1990 – San Francisco, California

Filed September 25, 1990

Before: Mary M. Schroeder and William C. Canby, Jr., Circuit Judges, and Judith N. Keep,* District Judge.

*The Honorable Judith N. Keep, United States District Judge for the Southern District of California, sitting by designation.

CANBY, Circuit Judge:

Nui Loa Price, Kamuela Price and the Hou Hawaiians (hereinafter "Price"), all native Hawaiians, appeal from the district court's dismissal of their action, brought under 42 U.S.C. § 1983, for damages against the trustees of the Office of Hawaiian Affairs. Price alleges that the defendants contravened federal law restricting the management of Hawaiian lands previously held by the United States. The district court dismissed the action for failure to state a claim and for lack of subject matter jurisdiction. We reverse and remand the case to the district court.

FACTS

When Hawaii achieved statehood, the United States ceded to the new State almost all of the Hawaiian lands to which the federal government held title. *See* Hawaii Admission Act, Pub.L. No. 86-3 (hereinafter the "Admission Act") § 5(b), 73 Stat. 5 (1959), as amended by the Hawaiian Omnibus Act. Pub.L. No. 86-624, 74 Stat. 411 (1960). At the same time, the United States imposed obligations upon Hawaii with respect to these lands. In particular, it specified that such lands, and the income from them

> shall be held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians . . . for the development of farm and home ownership . . . , and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of [Hawaii] may provide, and

> their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

See Admission Act § 5(f).

In its constitution, Hawaii declared that it would hold a portion of the lands conveyed by § 5(b) as a "public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4. Subsequently, the Hawaiian legislature established the Office of Hawaiian Affairs (hereinafter the "OHA") to serve "native Hawaiians and Hawaiians." Haw. Const., art. XII, § 6. The state funded the OHA in part by granting it a share of the income produced by the "public land trust" created out of the § 5(b) lands. Haw. Rev. Stat. § 10-3.[1]

In this suit, filed under 42 U.S.C. § 1983, Price alleges that the trustees of the OHA have violated the Admission

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[1] Among the lands expressly conveyed by § 5(b) were those known as the Hawaiian "homelands". A "compact" between Hawaii and the United States strictly limits the manner in which Hawaii may manage the homelands and the income they produce. *See* Admission Act § 4; *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1218-19 (9th Cir.) (*"Keaukaha I"*), *cert. denied*, 444 U.S. 826 (1979); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1469 (9th Cir. 1984) (*"Keaukaha II"*); *Price v. Hawaii*, 764 F.2d 623, 625 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). The "public land trust" created by the Hawaiian constitution, however, does not include the homelands. *See* Haw. Const., art. XII, § 4. Consequently, the trust proceeds granted to the OHA are unrelated to the homelands, *see* Haw. Rev. Stat. § 10-3; and whether State officials are managing the homelands and the income they produce in conformity with the compact between Hawaii and the United States is not at issue in this case.

Act by managing income derived from § 5(b) lands in a manner that contravenes § 5(f) of the Act. More specifically, he contends that the trustees have comingled OHA's share of that income with other OHA funds; that they have expended none of it for the benefit of native Hawaiians; and that they have used it instead for purposes other than those listed in § 5(f). *See* Complaint, ¶¶ 15, 14, 16.

Without filing an Answer to Price's Complaint, the trustees moved to dismiss the action. The district court granted the motion on the grounds that (A) the court lacks subject matter jurisdiction, and (B) the Complaint does not state a claim upon which relief can be granted. On appeal, Price takes issue with both of these rulings.

DISCUSSION

Having accepted the Complaint's allegations as true, and having construed the Complaint in the light most favorable to Price, *see Baker v. McNeil Island Corrections Ctr.*, 859 F.2d 124, 127 (9th Cir. 1988), we hold that Price has stated a claim and that the district court has jurisdiction to hear it. We conclude therefore that the court's dismissal was erroneous.

A. *Failure To State A Claim*

The district court found that Price has not stated a claim because the Admission Act does not impose the obligations that Price asserts the trustees have violated. This ruling is one of law and we review it *de novo*. *See*

Thomas v. Carpenter, 881 F.2d 828, 829 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1475 (1990).

Section 5(f) of the Admission Act directed unequivocally that the lands conveyed to Hawaii in § 5(b), and the income produced by them, "shall be managed and disposed of for one or more" of five stated purposes. Admission Act, § 5(f). Because the OHA share of "public trust" income at issue in this case derives directly from the § 5(b) lands, § 5(f)'s limitation on uses applies to that income. In his Complaint, Price alleges that the trustees have expended the income on purposes other than those listed in § 5(f). *See* Complaint, ¶¶ 14, 16. Thus, the Complaint states a claim to enforce the provisions of § 5(f) of the Admission Act.

The fact that the trustees may, consistently with § 5(f), spend the income for purposes other than to benefit native Hawaiians does not deprive Price of standing to bring his claim. We recently considered this very question, and determined that allegations such as those Price has made are sufficient to show an "injury in fact". *See Price*, 764 F.2d at 630.[2] In addition, allowing Price to

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[2] The trustees argue that the *Price* decision on standing does not apply to this case because the relief sought in *Price* was prospective, while the relief sought here is retrospective. That difference, however, does not affect standing. We held in *Price* that native Hawaiians had standing to compel future compliance with the terms of § 5(f) even though compliance would not necessarily result in use of § 5(f) assets to benefit native Hawaiians. Following that precedent, we hold here that Price, as a native Hawaiian, has standing to seek redress for past violations of § 5(f) even though that redress may not

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enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to aide by the terms of the trust. *See* Restatement 2d of the Law of Trusts, § 214(1), comment a; *See also id.* at § 391 (stating that plaintiff with "special interest," beyond that of ordinary citizen, may sue to enforce public charitable trust).

The trustees argue that they may not be held liable for breaching the terms of § 5(f) because the "OHA trust," which they manage and into which the OHA share of § 5(f) income was placed, is distinct from the trust created by § 5(f). Transferring a portion of the § 5(f) trust income to a state agency, however, did not dissolve or dilute the restrictions on how that income may be spent. So long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied. Naturally, we accept that once the income has been "disposed of" or "use[d]" by the state, there are no § 5(f) limitations on

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necessarily benefit native Hawaiians. Moreover, we note that counsel for Price asserted at oral argument that among the *state*-authorized purposes for which the OHA may spend its funds, only one – the benefit of native Hawaiians – is authorized by § 5(f). If Price succeeds in proving that the trustees have misappropriated § 5(f) income and must return it to the OHA or § 5(f) trust, he might attempt to show, perhaps in a pendent claim, that the returned money must be used to benefit native Hawaiians. Thus, Price has a real stake in enforcing the terms of § 5(f).

subsequent use; however, we reject the trustees' suggestion that Hawaii "disposed of" or "used" § 5(f) trust income simply by transferring it to the OHA. Admission Act § 5(f). Because the funds are still in state hands, § 5(f)'s restrictions apply to the use or disposal of the income *by OHA*.

The trustees also maintain that, although Hawaii itself may be bound by § 5(f), the trustees' obligations with respect to spending OHA funds are to state law alone. The trustees' position is squarely at odds with the principle of § 1983 in general, and our recent Admission Act decisions in particular. Any ordinary policeman sued under § 1983 defendant is, in his official function, a creature of the state, and his primary obligations are to state law; yet, he is not thereby relieved of the duty not to deprive persons of their federal rights. In a similar vein, the fourteenth amendment addresses itself to "states," but that does not mean that entities and agents inferior to states are incapable of violating the amendment by depriving citizens of due process and equal protection. *See, e.g., Sheuer v. Rhoads*, 416 U.S. 232, 235 (1974) (holding that state governor and state university president were sueable under § 1983 for due process violations). Furthermore, the defendants in *Keaukaha II*, officers of the Hawaiian Homes Commission, also answered to state law in the execution of their official functions; yet, they were held properly subject to a § 1983 suit for breach of § 5(f). *See* 739 F.2d at 1472.

B. *Subject Matter Jurisdiction*

The district court concluded that it lacks jurisdiction to hear Price's suit for two independent reasons: first,

Price's claim is state rather than federal in nature, and therefore § 1983, the asserted basis of jurisdiction, is unavailable; second, Price's suit is against the trustees in their official capacities, and therefore barred by the eleventh amendment. These issues are reviewable *de novo*. *See Keaukaha I*, 588 F.2d at 1224-27 (federal nature of claim); *Keaukaha II*, 739 F.2d at 1471-72 (same); *BV Engineering v. University of California at Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988) (eleventh amendment immunity), *cert. denied*, 109 S. Ct. 1557 (1989).

1. *Nature of Price's claim*

The right Price claims is indeed federal; thus, he has not failed to meet this requirement of § 1983. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 536 (1981) (§ 1983 plaintiff must allege deprivation of federal, not state, right). In *Keaukaha II*, we held that the right asserted by the plaintiffs was federal because it was "specifically protected by an Act of Congress, the Admission Act, § 5(f)," 739 F.2d at 1472. The § 5(f) trust obligation, we said, was "rooted in federal law." *Id.* Moreover, we recently have characterized *Keaukaha II* as holding that "§ 5(f) of the Admission Act creates a federal 'right' enforceable under 42 U.S.C. § 1983." *Price*, 764 F.2d at 628; *see also Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990). The source of the right Price asserts here is precisely the same as the source of the right claimed in *Keaukaha II*, namely § 5(f) of the Admission Act. Hence, the right Price asserts also is federal, and § 1983 is available.

2. *Applicability of the eleventh amendment*

Price is suing the trustees in their individual, rather than official, capacities, and thus his suit is not barred by the eleventh amendment. *See Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988) (noting that eleventh amendment does not prohibit individual capacity suits); *cf. Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985) (observing that official capacity suits are equivalent to suits against the entity itself, and raise eleventh amendment concerns where the entity is a state). Although the Complaint does not expressly state that Price is suing the trustees themselves, as opposed to the state, the "basis of the claims asserted and nature of relief sought" imply that this must be so. *See Central Reserve Life Ins. Co. v. Struve*, 852 F.2d 1158, 1161 (9th Cir. 1988) (relying on these factors, rather than on caption of complaint, to determine capacity in which defendant is being sued).

By seeking damages under § 1983, the Complaint indicates that the intended defendants are the trustees as individuals. *See Blaylock*, 862 F.2d at 1354 ("[D]amage actions brought under 42 U.S.C. § 1983 are generally viewed as suits against the individual"); *Demery v. Kupperman*, 735 F.2d 1139, 1145-46 (9th Cir. 1984) (construing § 1983 damage action as individual capacity suit), *cert. denied*, 469 U.S. 1127 (1985). To sue Hawaii itself, by proceeding against the trustees in their official capacities, would have been inconsistent with the very nature of Price's claim, since § 1983 applies only to deprivations of federal rights by "persons," and Hawaii is not a person

under the statute. *See* 42 U.S.C. § 1983; *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2307-08 (1989).[3]

The trustees argue, and the district court found, that Price's suit must be against the trustees in their official capacities because the Complaint's allegations concern the trustees' conduct while performing their official functions. This argument confuses the capacity in which a defendant is sued with the capacity in which the defendant was acting when the alleged deprivation of rights occurred. The former need not coincide with the latter. Clearly, under § 1983, a plaintiff may sue a state officer in his individual capacity for alleged wrongs committed by the officer in his official capacity. *See, e.g., Blaylock*, 862 F.2d at 1354 (observing that plaintiff who alleged failure by governor to administer certain law could avoid eleventh amendment bar by amending complaint to claim only damages against governor in his individual capacity); *Demery*, 735 F.2d at 1146 (construing as individual capacity suit an action against state medical board supervisor who enforced allegedly ineffective disciplinary order of board).[4]

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[3] Only if Price had sought prospective relief could this inconsistency have been avoided; such an action against the trustees in their official capacities would not have been an action against the state. *See Will*, 109 S. Ct. at 2311 n.10. Price, however, has not sought prospective relief in his Complaint.

[4] *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198 (9th Cir. 1988), *cert. denied*, 109 U.S. 2102 (1989), does not support the trustees' position. *Mitchell* held that the defendants in that case "share[d] in [the state's] eleventh amendment immunity because they were sued in their official capacities."

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CONCLUSION

The district court erred in concluding that Price has not stated a claim, and that the court is without jurisdiction to hear it. The order of dismissal is therefore REVERSED, and the case is REMANDED.

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It did not expressly state the basis on which it had decided that the action was an official capacity suit. *See id.* at 201-02. In that case, it was apparently undisputed that the plaintiffs were seeking damages from a California community college district, and that the officials of the district were being sued in their official capacity. The question was whether, under California law, the district should be regarded as a state agency. In this case, the plaintiffs have disavowed any claim for state funds, and have made it clear they are seeking damages from the personal estates of the individual defendants. The defendants therefore do not share the state's immunity from this suit.

APPENDIX "F"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MERVIN NAPEAHI, individually and on behalf of all those similarly situated, Plaintiff-Appellant, v. WILLIAM PATY, in his capacity as Director of the Department of Land and Natural Resources, State of Hawaii, Defendant-Appellee.	No. 87-1844 DC No. CV-85-1523-EMF ORDER

(Filed Mar. 20, 1991)

Appeal from the United States District Court
for the District of Hawaii

Before: HUG, TANG, and KOZINSKI, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX "G"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

MERVIN NAPEAHI, SIERRA CLUB, and HAWAI'I AUDUBON SOCIETY, Plaintiffs, vs. JOHN O. MARSH, in his capacity as the Secretary of the Army; COL. MICHAEL M. JENKS, in his capacity as District Engineer, U.S. Army Corps of Engineers; LEE THOMAS, in his capacity as Administrator, U.S. Environmental Protection Agency; JUDITH AYRES, in her capacity as Regional Administrator of the U.S. EPA Region IX; TRANSCONTINENTAL DEVELOPMENT COMPANY, ATPAC LAND COMPANY, LESLIE S. MATSUBARA, in his capacity as the director of the Department of Health, State of Hawaii, SUSUMU ONO, in his capacity as director of the Department of Land and Natural Resources, State of Hawaii, Defendants.	CIVIL NO. 85-1523 FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF; SUMMONS FILED FEB 14 1986

FIRST AMENDED COMPLAINT
FOR DECLARATORY RELIEF

1. Plaintiffs MERVIN NAPEAHI, SIERRA CLUB, and HAWAI'I AUDUBON SOCIETY bring this action

primarily to enforce the water certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. § 1341. These requirements mandate that the State of Hawaii or the U.S. Environmental Protection Agency certify that any dredge and fill activity in U.S waters will comply with state water quality standards before the U.S. Army Corps of Engineers (hereinafter "CORPS") issues a dredge and fill permit pursuant to Section 404 of the Act.

2. Defendants MARSH and JENKS issued a dredge and fill permit which allows blasting and excavation of a five-acre swimming lagoon and other related facilities for a tourist resort complex to be built on the shoreline at Waikoloa near Waiulua Bay, South Kohala, located on the Island of Hawai'i. However, neither the state nor the EPA certified that the activity would comply with state water quality standards. Accordingly, Plaintiffs petition this Court to declare such permit is to be null and void and to enjoin the Corps and Defendants TRANSCONTINENTAL DEVELOPMENT CO. and ATPAC LAND CO. from relying on or acting pursuant to such permit.

3. Plaintiffs also seek to have this court declare as a matter of pendent jurisdiction that the acts of the state defendants will result, unless corrected, in the loss and abandonment of ceded lands, for no compensation, in violation of the trust duties those defendants owe Plaintiffs.

JURISDICTION

4. This Court has jurisdiction over this action pursuant to 28 USC §§ 1331, 1337, 1343(3), 1361; 33 USC § 1365 and pendent jurisdiction. The claims arise under 5

USC § 701-706; 33 USC §§ 403, 1311, *et seq.*; and Article XI, Section 9 of the Hawai'i State Constitution. Plaintiffs sent to Defendant THOMAS and AYRES the required 60-day notice of potential violations of the Clean Water Act pursuant to 33 USC § 1365.

PARTIES

5. Plaintiff MERVIN NAPEAHI is a 45 year-old resident of Honalo, Kona, Hawai'i. He is a pure Hawaiian who has frequented the area on the island of Hawai'i known as Waiulua Bay, adjacent to the ahupua'a of Waikoloa to gather fish, opae, and other marine food products like opihi, limu, and squid from the sea and anchialine ponds in the area, for subsistence purposes, to camp, and to enjoy the aesthetic, open space, marine, and terrestrial resources of the area. He seeks to protect and conserve these resources for future generations as his Hawaiian ancestors have done for centuries.

6. Plaintiff SIERRA CLUB is a nonprofit corporation organized and existing under the laws of the State of California, with its principal place of business in the City and County of San Francisco, State of California. SIERRA CLUB is a national conservation organization with approximately 350,000 members of whom approximately 2,000 reside in the State of Hawai'i. The general purposes of the SIERRA CLUB include the enjoyment, enhancement, protection and preservation, by all lawful means, of the forests, waters, wildlife, wilderness, and other natural and scenic resources of the United States and the Earth in general. The SIERRA CLUB is committed to preserving

and maintaining the world's remaining natural ecosystems, such as the unique and rare Waikoloa anchialine ponds. Many Hawai'i Sierra Club members have visited the site of the proposed resort for recreation and enjoyment of the natural, conservational, and aesthetic resources of the area, including the anchialine pond complex found there.

7. Plaintiff HAWAI'I AUDUBON SOCIETY (HAS) is a nonprofit association formed under the laws of the State of Hawai'i, having about 1500 members of whom approximately 1200 reside in the state of Hawai'i. HAS was formed to further the protection and conservation of Hawi'i's native wildlife and the ecosystem which support that wildlife. Many HAS members have visited the proposed resort site to enjoy the scenic, recreational, and biological resources of the area, including the complex of anchialine ponds.

8. The above-described aesthetic, conservational, and recreational interests of SIERRA CLUB and HAWAI'I AUDUBON SOCIETY and their members have been, are, and will continue to be adversely affected and irreparably injured by the Corps' decision to issue the Section 404 permit and the EPA's refusal to veto the permit, as well as the effects of the construction activities on the resources they seek to protect.

9. Defendant JOHN O. MARSH, JR., is the Secretary of the Army. In this capacity he is ultimately responsible for the decision of the Corps to issue the permits pursuant to Section 404 of the Clean Water Act and he is also ultimately responsible for enforcement of Section 10 of the Rivers and Harbors Act of 1899, which regulates any

obstructions to navigable U.S. waters. He is the Army official administratively responsible for all Corps decisions.

10. Defendant Colonel MICHAEL M. JENKS is the District Engineer for the U.S. Army Corps of Engineers, Pacific Ocean Division, Honolulu District (hereafter "CORPS"). He is the primary administrative person responsible on the district level of the CORPS for the decision to issue a Section 404 dredge and fill permit which would allow dredging and filling for construction of the planned Waikoloa Beach Resort.

11. Defendant LEE THOMAS is the Administrator of Defendant Environmental Protection Agency (EPA), the primary federal agency responsible for implementation of and oversight over the Clean Water Act. He is ultimately responsible for all EPA actions and must consult with Defendants MARSH and JENKS if the EPA disagrees with a CORPS decision to grant a permit.

12. Defendant JUDITH AYRES is the Regional Administrator of Region IX of the EPA, the lowest administrative level of this agency which was responsible for reviewing the decision of the CORPS to issue the Section 404 permit involved in this action.

13. Defendant TRANSCONTINENTAL DEVELOPMENT COMPANY is a general partnership consisting of Transcontinental Corporation, a California corporation whose principal place of business is Santa Barbara, California and Motyko Inc., a Texas corporation whose principal place of business is Fort Worth, Texas. It is a co-

applicant with Defendant ATPAC LAND CO. for the Section 404 permit as developer and partial landowner of the planned Waikoloa Beach Resort.

14. Defendant ATPAC LAND COMPANY is a general partnership consisting of Ronald F. Boeddeker whose address is 225 Las Tunas Road, Santa Barbara, California and SRL Enterprises, a Texas general partnership whose principal place of business is Fort Worth, Texas. It is co-applicant with Defendant TRANSCONTINENTAL DEVELOPMENT CO. for the Section 404 permit as partial landowner of the planned Waikoloa Beach Resort.

15. Defendant LESLIE S. MATSUBARA is the director of the State of Hawaii Department of Health, the state agency encharged with the responsibility of enforcing water quality standards in the state under state and federal law. He is ultimately responsible for any department certification of compliance with state water quality standards adopted pursuant to the Clean Water Act.

16. Defendant SUSUMU ONO is the director of the State of Hawaii Department of Land and Natural Resources, the state agency encharged with the trust duty to protect and manage the ceded land trust, in part, for the benefit of native Hawaiians. He is also ultimately responsible for any shoreline certifications issued by the state.

FACTUAL ALLEGATIONS

17. In September, 1984, Transcontinental Development Company (Transcontinental) applied to the CORPS for a Section 404 dredge and fill permit to excavate a five-

acre artificial lagoon and fill beach as a part of a planned 1,250-room resort complex involving a luxury hotel and luxury condominium to be located at Waikoloa, on the leeward coast of the island of Hawai'i, near Waiulua Bay.

18. Because this application requested authorization to excavate and fill eighty anchialine ponds without any mitigation measures, the CORPS initially refused to accept the application until it could negotiate an amended application to incorporate such measures.

19. An anchialine pond is a water body having measurable salinities and tidal fluctuations, but isolated from the sea. These ponds are essentially brackish water ponds, forming a unique ecosystem for several rare species of shrimp, two of which are found in Waikoloa.

20. The area proposed for dredging contains approximately 200 anchialine ponds. This site contains the single, largest concentration of anchialine ponds in the State of Hawai'i, where they are only known to exist on Maui, O'ahu, and Hawai'i.

21. The ponds are included in the definition of U.S. navigable waters pursuant to the Clean Water Act.

22. These ponds comprise approximately a third of approximately 650 such ponds known to exist in Hawai'i, and are not found in other parts of the U.S.

23. Because of this distinction, the EPA considers these ponds a "special aquatic site" as defined in 40 CFR Part 230, Subpart E, which entitles it to special protection under the CWA.

24. The coastal waters off the shoreline in the area immediately adjacent to the planned lagoons and the

water of the ponds are rated Class AA by the Department of Health, State of Hawai'i, the highest rating assigned to coastal waters in Hawai'i pursuant to the Clean Water Act.

25. Plaintiff NAPEAHI has frequented this coastal area to gather opihi, limu, fish, for subsistence purpose, and to camp, and enjoy its natural coastal and open space resources.

26. Many other residents of West Hawai'i have utilized this area for similar purposes.

27. In January, 1985, both Transcontinental and ATPAC Land Company (ATPAC), a landowner of a portion of the Waikoloa Beach Resort (hereafter "WBR") area, jointly filed another application for a Section 404 permit for a more comprehensive resort plan.

28. Defendant JENKS accepted this application and began to process without requiring a certification of compliance with state water quality standards from the applicants.

29. Pursuant to this application, Defendant JENKS prepared a draft Environmental Impact Statement (hereafter "DEIS") on the proposed action, which the EPA reviewed.

30. Defendant JENKS prepared a final EIS (FEIS) covering its proposed approval of the Section 404 permit which fails to analyze and identify all the environmental impacts.

31. The FEIS does not mention the uncompensated loss of approximately 2-3 acres of ceded lands which

were abandoned by the state when it altered the certified shoreline of Waialua Bay.

32. In connection with this planned dredging and filling, no person applied to an authorized state "certifying agency" or the EPA for a certification of compliance with the Water Quality Standards of the State of Hawai'i, pursuant to Section 401 of the Clean Water Act.

33. Accordingly, neither the EPA or the CORPS has determined, at any time, whether such activity will violate the state's Water Quality Standards as defined under Administrative Regulations § 11-54-04.

34. Defendant Matsubara refuses even to make such a determination on the basis that there are no effluent limitation standards for construction activity which apply to the planned resort.

35. The State of Hawai'i has failed to grant any state agency the legal "authority" to be the "certifying agency" as defined in 40 C.F.R. § 121.1(e).

36. The EPA has not certified that the planned dredging and filling will comply with the state's Water Quality Standards.

37. Thus, no agency has ever given public notice regarding application for certification of compliance with Section 401 Clean Water Act standards nor waived their opportunity to certify compliance.

38. The CORPS Defendants were aware of the applicants' failure to certify compliance with the state Water Quality Standards prior to the CORPS' decision to issue the Section 404 permit.

39. On various occasions prior to December 10, 1985, Plaintiffs and several other interested parties notified EPA Defendants THOMAS and AYRES of the lack of a Section 401 certification of compliance with state Water Quality Standards prior to the issuance of Section 404 permit and the potential violation of the CWA.

40. EPA Defendants AYRES and THOMAS refused to veto the pending Section 404 permit despite an opportunity to do so.

41. On December 20, 1985 Defendant JENKS issued a Section 404 permit for dredge and fill activity at the Waikoloa Beach Resort site to Defendants TRANSCONTINENTAL DEVELOPMENT CO. and ATPAC LAND CO. without obtaining Section 401 water quality certification or waiver of certification requirements.

42. Defendant JENKS, MARSH, THOMAS, and AYRES have refused to require the private defendants to certify that they will comply with the state water quality standards or to compel the state to apply those standards in this instance.

43. As a condition attached to the permit, Defendant JENKS required the private Defendants to purportedly mitigate the planned destruction of 65-70% of the valuable and unique anchialine ponds located on the project site by constructing artificial ponds to substitute for the destroyed ponds.

44. Defendant JENKS required the developers to submit a pond recreation plan for this purpose to the Corps for review and approval prior to implementing mitigation measures.

45. On two past occasions, the private defendants or their agents illegally placed fill material upon submerged lands located at the inlet connecting Waialua Bay and the open anchialine ponds adjacent to the bay, without authorization from the Corps or the State of Hawaii.

46. This fill created a land bridge across the inlet over property designated as submerged lands in previous surveys of the shoreline areas.

47. After citation and legal action by the Corps, the private defendants removed only a portion of the fill over submerged land.

48. The private Defendants will be using the remaining fill land without compensation to the State of Hawaii.

49. In reliance on the permit issued by the Corps, the private Defendants filled in 65-70% of the anchialine ponds in conjunction with their construction of the planned resort and began developing a plan to construct artificial ponds in an attempt to replace those they destroyed. This plan includes the construction of artificial ponds in an area set aside as a pond preservation area. The private defendants filled in the open anchialine ponds which were once delineated as submerged lands in previous shoreline surveys, as part of the construction of the planned resort.

50. The loss of these submerged lands from this construction will result in a direct economic benefit to the private defendants at the expense of the state of Hawaii, which will receive no compensation from the abandonment.

51. These submerged lands are included in the ceded lands trust, which the U.S. created, *inter alia*, for the betterment of native Hawaiians, like Plaintiff NAPEAHI.

52. The creation of artificial ponds on the project site could cause further harm to the remaining preserved anchialine ponds.

53. Plaintiffs now file this action to invalidate the permit and enjoin any dredge and fill activity to be commenced in reliance of it until the CORPS obtains a valid certification of compliance with the state Water Quality Standards from the developer applicants.

54. Plaintiff NAPEAHI also seek declaratory and damage relief for the uncompensated loss of ceded lands.

[material deleted in printing]

FOURTH CLAIM FOR RELIEF: BREACH OF CEDED LAND TRUST

76. Section 5(f) of the Admissions Act, Vol. 1, Hawaii Revised Statutes, establishes a ceded land trust, the revenues of which are administered by the State of Hawai'i, through Defendant ONO's Department of Land and Natural Resources, as a trustee, in part, for the betterment of Native Hawaiians.

77. Plaintiff NAPEAHI as a native Hawaiian who is a beneficiary of this trust who will be injured by the abandonment of ceded land caused by the alteration of the certified shoreline by the Department of Land and Natural Resources, use of fill land in Waiulua Bay and filling and future commercial use of these submerged

lands by the private Defendants, without renumeration to the State.

78. He will also be injured by the uncompensated loss of the submerged land beneath the remnant of the illegal fill placed in Waiulua Bay and future commercial use of this area by the private Defendants without renumeration to the State.

79. Defendant ONO breached his fiduciary duty to Plaintiff NAPEAHI by allowing the surrender of this property, without compensation, to the private defendants.

80. Accordingly, the Department violated Section 5(f) of the Admissions Act, and Plaintiff Napeahi is entitled to damages from uncompensated loss of these lands.

[material deleted in printing]

PRAYER FOR RELIEF

THEREFORE, Plaintiffs hereby pray that this court:

1. assume jurisdiction over this action;

2. declare that the CORPS and/or the EPA violated the CWA by failing to determine whether the proposed activity will violate the state Water Quality Standards and by failing to require Transcontinental Development Company and ATPAC Land Company to apply for a certification of compliance with those standards as a part of the application procedure for a Section 404 permit;

3. declare that the issuance of the Section 404 permit on December 20, 1985 violates Section 404(b) guidelines

and is null and void under 5 USC § 706 and should have been vetoed by the EPA;

4. declare the Section 404(a) permit issued in violation of the above standards is a violation of Article XI, Section 9 of the Hawai'i State Constitution and the CWA, and Article XI, Section 9 of the Hawai'i State Constitution and is null and void;

5. declare that the recertification of the shoreline at the tip of Waialua Bay resulted in the abandonment of approximately three acres of ceded land without compensation to the State of Hawaii.

6. order further proceedings to determine the value of the submerged land abandoned by Defendant ONO to the private defendants so appropriate compensation can be awarded.

7. enjoin the CORPS from issuing any subsequent Section 404 dredge and fill permit to allow dredge and fill operations at Waikoloa, until and unless the the EPA or the State of Hawai'i properly certifies that the WBR project will comply with the state Water Quality Standards.

8. grant such other relief as it determines just and equitable including any necessary preliminary relief to preserve the rights of the Plaintiffs.

DATED: Honolulu, Hawai'i, February 14, 1986.

/s/ Alan T. Murakami
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SOCIETY

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, SIERRA CLUB, and HAWAI'I AUDUBON SOCIETY, Plaintiffs, vs. JOHN O. MARSH, in his capacity as the Secretary of the Army; et al., Defendants.	Civil No. 85-1523 NOTICE OF MOTION TO DISMISS FIRST AMENDED COMPLAINT; MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT Hearing: May 27, 1968 Time: 9:00 a.m. Judge: Honorable Harold M. Fong FILED MAR 20 1986

[Material deleted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, SIERRA CLUB, and HAWAI'I AUDUBON SOCIETY, Plaintiffs, vs. JOHN O. MARSH, in his capacity as the Secretary of the Army; et al., Defendants.	Civil No. 85-1523 MOTION TO DISMISS FIRST AMENDED COMPLAINT

MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants LESLIE S. MATSUBARA, in his capacity as the director of the Department of Health, State of Hawaii, by and through his counsel, Herbert Y. Hamada, Deputy Attorney General, and SUSUMU ONO, in his capacity as the chairperson of the Department of Land and Natural Resources, by and through his counsel, Chelun Huang and Edwin P. Watson, Deputy Attorneys General, move this Court for an order dismissing Plaintiffs' First Amended Complaint filed hereinabove upon the following grounds:

1. Failure to state a claim upon which relief can be granted; and,

2. Lack of a Federal Question; and,

3. The State of Hawaii has not consented to being sued nor waived its sovereign immunity pursuant to the Eleventh Amendment.

This motion is brought pursuant to Rule 12 of the Federal Rules of Civil Procedure, the attached memorandum of points and authorities, and such other evidence as the Court may consider at the hearing of this matter, and the records, files and pleadings herein.

Dated: Honolulu, Hawaii, March 20, 1986.

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State of Hawaii

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, SIERRA CLUB, and HAWAI'I AUDUBON SOCIETY, Plaintiffs, vs. JOHN O. MARSH, in his capacity as the Secretary of the Army; et al., Defendants.	Civil No. 85-1523 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

I. STATEMENT OF THE CASE

The Plaintiffs have filed a First Amended Complaint seeking to declare a dredge and fill permit issued to Defendants Transcontinental Development Corporation and ATPAC Land Co. for the development project known as the Waikaloa Beach Resort as null and void. The permit was issued pursuant to section 404 of the Clean Water Act. The Amended Complaint names LESLIE S. MATSUBARA as defendant in his official capacity as the director of the Department of Health, State of Hawaii, and also names SUSUMU ONO as a defendant in his official capacity as the chairperson of the Department of Land and Natural Resources, State of Hawaii. Out of the eighty-five paragraphs of the Amended Complaint only three paragraphs mention LESLIE S. MATSUBARA and the prayer for relief does not seek any specific remedy against LESLIE S. MATSUBARA. Insofar as defendant

SUSUMU ONO is concerned Plaintiffs have alleged a breach of trust under the Admissions Act and an unclear allegation as to shoreline certification.

ARGUMENT

A. Plaintiffs allege no set of facts to support a claim upon which relief is possible.

Rule 12(b) of the Federal Rules of Civil Procedure provides that "failure to state a claim upon which relief can be granted," is a defense that may be pleaded by motion. The motion shall be granted when "it appears beyond doubt that the plaintiff can prove no set facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

On a motion to dismiss for failure to state a claim upon which relief can be granted legal conclusions and opinions are not presumed in favor of the non-moving party. "We do not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1980). "[C]onclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), affm'd 460 U.S. 325 (1983). "On a motion to dismiss, facts well pleaded are taken as correct, but allegations of conclusions or opinions are not sufficient when no facts are alleged by way of the statement of the claim." *Bryan v. Stillwater Board of Realtors*, 578 F.2d 1319 (10th Cir. 1977).

The three paragraphs referring to Defendant Leslie S. Matsubara do not contain factual allegations. Paragraph 15 under the section entitled "Parties," reads as follows:

> 15. Defendant LESLIE S. MATSUBARA is the director of the State of Hawaii Department of Health, the state agency encharged with the responsibility of enforcing water quality standards in the state under state and federal law. He is ultimately responsible for any department certification of compliance with state water quality standards adopted pursuant to the Clean Water Act.

The responsibility of the director of health under state or federal law is a legal interpretation or conclusion.

Paragraph 34 under the section entitled "Factual Allegations" reads as follows:

> 34. Defendant Matsubara refuses even to make such a determination on the basis that there are no effluent limitation standards for construction activity which apply to the planned resort.

This allegation is plaintiffs' opinion that Defendant Matsubara refuses to determine whether Water Quality standards defined under Administrative Regulation of the State Department of Health § 11-54-04 will be violated. Plaintiffs do not assert any duty on Defendant Matsubara to make such a determination. In fact, in the next paragraph, thirty-five, plaintiffs claim that no state agency has the legal authority as a certifying agent to make such a determination. In paragraph 34 plaintiffs merely state Defendant Matsubara's basis for refusing to make a determination and in no other paragraph in the amended complaint allege that the basis is contrary to

law or incorrect for any reason. The refusal and the basis for the refusal do not relate to the claim that the § 404 permit is invalid.

Paragraph 63 under the section entitled "First Claim for Relief: Failure To Certify Compliance With State Water Quality Standards" simply rephrases the opinion made in paragraph thirty-four and adds a conclusion of law.

Paragraph 63 states:

> 63. Defendant MATSUBARA's refusal to apply the state water quality standards to the construction of the planned resort violates Section 401 of the CWA.

Plaintiffs' conclusion of law that § 401 is violated is also incorrect. As pointed out in paragraph fifty-six and stated in 33 U.S.C. § 1341, certification is waived if the certifying agency fails to act within a reasonable time.

Plaintiffs' prayer for relief basically asks for compensation for ceded lands and a declaration that the § 404 permit is null and void. The § 404 permit is issued by Defendant Corps of Engineers. Defendant Matsubara is not involved at all with ceded lands.

Plaintiffs seek no relief from the Director of health and none is available to plaintiffs from the Director. The three paragraphs were merely inserted between existing paragraphs of the original complaint. Except for the allegation about ceded lands, the amended complaint adds Leslie S. Matsubara as a defendant without a new claim or new allegations of fact.

B. Issues involving shoreline certification do not constitute a "federal question" and are more properly decided in the state courts.

The State of Hawaii has an extensive real property regulatory system, as an example Hawaii Revised Statutes, Chapter 205 regulates Land Use and Chapter 205a Coastal Zone Management. Hawaii Revised Statutes such as those already mentioned and others as well as rules and regulations promulgated by various State departments and the counties and their entities reflect the State of Hawaii's domestic policies in the area of real property law. Inasmuch as land regulation is a sensitive area of social policy in the State of Hawaii, the federal court should defer judgment on issues relating to land use, regulation and management to the state courts.

In *Burford v. Sun Oil Co., et al.*, 319 U.S. 315, 317, 87 L.Ed. 1424, 63 S.C. 1098 (1943):

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest;" for it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.

A review of the Hawaii Revised Statutes indicate that methods of appeal are provided for aggrieved parties involving State or County decisions. The plaintiffs in the

present case allude to improprieties in shoreline certification. The proper forum for challenging shoreline certification is in the State court system and not in Federal court.

Abstention would also preclude the possibility of conflicting decisions by the Federal Court and State Courts over State land laws.

> Few public interests have a higher claim upon the discretion of a federal chancellor then the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner v. Boykin*, 271 U.S. 240; *Spielman Motor Co. v. Dodge*, 295 U.S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania v. Williams*, 294 U.S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the State, *Gilchrist v. Interborough Co.*, 279 U.S. 159; cf. *Hawks v. Hamill*, 288 U.S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrains their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. *See, Cavanagh v. Looney*, 248 U.S. 64, 73. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between the state and federal authority without the need of rigorous congressional restriction of these powers.

See, also Kollsman v. City of Los Angeles, 737 F.2d 830 (1984).

Based upon the foregoing authorities, Defendant, State of Hawaii, urges this court to abstain from interpreting and ruling on State land law issues such as shoreline

certification which does not involve a "federal question," and direct the Plaintiffs to the State court system for determination of such issues.

C. THE STATE OF HAWAII HAS NOT CONSENTED TO BE SUED NOR WAIVED ITS IMMUNITY FROM SUIT

The Complaint filed herein identifies the director of the Department of Health, State of Hawaii, and the chairperson of the Department of Land and Natural Resources as co-defendants. Although named in their official capacities this suit is in actuality a suit against the State of Hawaii.

Numerous decisions by the United States Supreme Court have held that an action against a state by one of its citizens is subject to dismissal where the state has not waived its sovereign immunity.

> The Eleventh Amendment provides that: "The judicial power of the United States shall not be construed to extend any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any foreign State." This express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent. *Ford Motor Company v. Department of Treasury of Indiana, et al.*, 323 U.S. 459, 89 L.Ed. 389, 65 S.C. 347 (1945). *See also, Hans v. Louisiana*, 134 U.S. 1(1890) and *Edelman v. Jordan*, 415 U.S. 651, 662, 39 L.Ed.2d 662, 94 S.C. 1347 (1974).

Although sovereign immunity may be waived such a waiver must be unequivocally expressed.

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction. *Edelman v. Jordan, supra,* at p. 673.

The State of Hawaii has not waived its sovereign immunity nor consented to be sued, and there is no express language waiving such immunity.

It is equally well established that the State's immunity extends to the officers, boards, commissions and agencies through which the State must act.

> In other words whether or not a suit is against the state is not to be determined solely by identification of the formal parties to the record, but determination rather depends on the particular issues involved, the relief sought, demanded, or prayed for, and the way in which it affects the state. A suit against the state is one in which the subject matter must be an interest of value of a material sense to the state as a distinct entity. A trial or appellate court should, at any state of the proceedings, dismiss a suit when it becomes convinced that the suit is against the state. *81A Corpus Juris Secondum, States,* § 303.

The plaintiffs have asked for retroactive relief in the form of monetary damages. (See: First Amended Complaint, paragraphs 79, 89 and the prayer for Relief, paragraph 6).

Damages if awarded to the Plaintiffs would ultimately come form the State treasury.

> . . . when the action is in essence one for the recovery of money from the state, the state is the

> real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Ford Motor Company v. Department of Treasury of Indiana, supra,* at 464. *See, also: Price v. State of Hawaii,* 764 F.2d 623 (1985).

Like the case of *Pennhurst State School and Hospital et al., v. Halderman et al,* 465 U.S. 89, 79 L.Ed.2d 67, 104 S.C. 900 (1984) Plaintiffs seek relief in a federal court against state officials upon the basis of state law (shoreline certification).

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated state law. In such a case the entire basis for the doctrine of Young and Edelman disappears. A federal court's grant of relief against state officials on the basis of state law, *whether prospective or retroactive,* does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignity than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that Young and Edelman are inapplicable in a suit against state officials on the basis of state law. *Pennhurst State School and Hospital v. Halderman, supra,* at 106. (emphasis added)

The Eleventh Amendment applies to pendent claims as well.

> This constitutional bar applies to pendent claims as well. As noted above, pendent jurisdiction is a judge-made doctrine of expediency and efficiency derived from the general Art. III language conferring power to hear all "cases"

arising under federal law or between diverse parties. *See, Mine Workers v. Gibbs*, 383 U.S. at 725. *See, also, Hagans v. Lavine, supra*, at 545 (termining pendent jurisdiction "a doctrine of discretion"). The Eleventh Amendment should not be construed to apply with less force to this implied form of jurisdiction than it does to the explicitly granted power to hear federal claims. The history of the adoption and development of the Amendment, *see, supra*, at 97-100, confirms that it is an independent limitation on all exercises of Art. III power: "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given," *Ex Parte State of New York*, 256 U.S. at 497. *If we were to hold otherwise, a federal court could award damages against a State on the basis of a pendent claim.* Our decision in *Edelman v. Jordan* makes clear that pendent jurisdiction does not permit such an evasion of the immunity guaranteed by the Eleventh Amendment.

We there held that "the District Court was correct in exercising pendent jurisdiction over [plaintiffs'] statutory claim," 415 U.S. at 653, n. 1, but then concluded that the Eleventh Amendment barred an award of retroactive relief on the basis of that pendant claim. *Id.* at 678.

In sum, contrary to the view implicit in decisions such as *Greene v. Louisville & Interurban R. Co.*, 244 U.S. 499 (1917), *neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.* A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We conclude above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. *See, supra*, at 106. We now

> hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction, *Pennhurst State School and Hospital v. Halderman, supra,* at 120-121. (Emphasis added).

Based upon the foregoing authorities the Eleventh Amendment is a bar to the suit filed herein against the State of Hawaii.

III. CONCLUSION

For the reasons that Plaintiffs have failed to state a claim upon which relief can be granted, that the complaint lacks a federal question for decision by the court, and that the State of Hawaii has not waived immunity from this suit, the complaint as related to Defendants Leslie S. Matsubara and Susumu Ono, both state officials, should be dismissed.

Dated: Honolulu, Hawaii, March 20, 1986.

CORINNE K. A. WATANABE
Attorney General
State of Hawaii

/s/ Chelun Huang
EDWIN P. WATSON
CHELUN HUANG
Deputy Attorneys General

Attorneys for Defendant
SUSUMU ONO, Chairperson,
Department of Land and
Natural Resources, State
of Hawaii

CORINNE K. A. WATANABE
Attorney General
State of Hawaii

/s/ Herbert Y. Hamada
HERBERT Y. HAMADA
Deputy Attorney General

Attorneys for Defendant
LESLIE S. MATSUBARA,
Director of Health,
State of Hawaii

APPENDIX "I"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, SIERRA CLUB, and HAWAI'I AUDUBON SOCIETY, Plaintiffs, vs. JOHN O. MARSH, in his capacity as the Secretary of the Army; et al., Defendants.	Civil No. 85-1523 ANSWER TO FIRST AMENDED COMPLAINT FILED MAR 21 1986

ANSWER TO FIRST AMENDED COMPLAINT

Comes now Defendant Leslie S. Matsubara, in his official capacity as Director of Health, State Department of Health, by and through his attorneys, Corinne K. A. Watanabe, Attorney General, and Herbert Y. Hamada, Deputy Attorney General, and answers the First Amended Complaint filed on February 14, 1986, as follows:

FIRST DEFENSE

1. The amended complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND DEFENSE

2. Defendant admits the allegation contained in paragraph 84. As to paragraph 15, Defendant admits he is the Director of Health, Department of Health, State of Hawaii but denies that the Department of Health is

encharged with the responsibility of enforcing water quality standards in the state under federal law.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in the following paragraphs of the amended complaint:

1 through 14; 16 through 23; 25 through 31; 33, 35 through 54; 59 through 61; 64 through 70; 72 through 75; 77; 78; 81; and 82.

4. Defendant denies each and every allocation contained in paragraphs 2; 4; 8; 24; 32; 34; 55 through 58; 62; 63; 71; 76; 79; 80; 83; and 85.

5. As to any other allegation not specifically mentioned above, Defendant denies the same.

THIRD DEFENSE

6. Plaintiffs lack standing to bring this amended complaint.

FOURTH DEFENSE

7. The amended complaint is barred by reason of sovereign immunity of the State of Hawaii.

FIFTH DEFENSE

8. The Amended Complaint is barred by the Eleventh Amendment of the United States Constitution.

SIXTH DEFENSE

9. The Amended Complaint is barred for the reasons that Plaintiffs have failed to exhaust all administrative remedies.

SEVENTH DEFENSE

10. The Amended Complaint is barred for the reason that Plaintiffs are estopped for having unclean hands.

WHEREFORE, Defendant prays that this Court:

a. Dismiss the Amended Complaint and render judgment in favor of Defendant.

b. Award Defendant court costs and attorneys fees;

c. Order such other and further relief as this Court deems proper.

Dated: Honolulu, Hawaii, March 21, 1986

CORINNE K. A. WATANABE
Attorney General
State of Hawaii

/s/ Herbert Y. Hamada
HERBERT Y. HAMADA
Deputy Attorney General

Attorneys for Defendant
LESLIE S. MATSUBARA,
Director of Health,
State of Hawaii

APPENDIX "J"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, SIERRA CLUB, and HAWAI'I AUDUBON SOCIETY, Plaintiffs, vs. JOHN O. MARSH, in his capacity as the Secretary of the Army; et al., Defendants.	CIVIL NO. 85-1523 ANSWER OF DEFENDANT, SUSUMO ONO, IN HIS OFFICIAL CAPACITY OF CHAIRPERSON, HAWAII BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII TO PLAINTIFFS' FIRST AMENDED COMPLAINT

FILED MAR 21 1986

ANSWER OF DEFENDANT, SUSUMO ONO, IN HIS OFFICIAL CAPACITY OF CHAIRPERSON, HAWAII BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Come now Defendant, Susumu Ono, in his official capacity as Chairperson of the Hawaii Board of Land and Natural Resources, hereinafter referred to as the "Land Department," through his attorneys Corinne K. A. Watanabe, Attorney General or the State of Hawaii, and Chelun Huang and Edwin P. Watson, Deputy Attorneys General and answer the First Amended Complaint filed herein as follows:

FIRST DEFENSE

This Court should refuse jurisdiction over the subject matter because the allegations of the First Amended Complaint are insufficient to invoke the Federal Question jurisdiction of Federal Courts.

SECOND DEFENSE

The First Amended Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

This Court lacks jurisdiction of the subject matter and over the person of the State of Hawaii for reason that the State has not consented to be sued nor waived its immunity from suit.

FOURTH DEFENSE

The Plaintiffs lack standing to bring this action.

FIFTH DEFENSE

Plaintiffs have no private right of action under Section 5(f) of the Admissions Act, Public Law 86-3, 73 Stat. 4, March 18, 1959.

SIXTH DEFENSE

Plaintiffs have failed to pursue and exhaust Administrative and Legal remedies available through State statutes, and County ordinances, and the State Court System.

SEVENTH DEFENSE

To the extent that Plaintiffs' Complaint purportedly states causes of action arising under Hawaii State Law this Court lacks pendent jurisdiction, because without jurisdiction under federal law, this Court has no pendent jurisdiction over purported state law claims.

EIGHTH DEFENSE

Plaintiffs' claims are barred by the equitable doctrines of laches, waiver, unclean hands, and/or estoppel.

NINTH DEFENSE

1. In answer to paragraphs 1, 2 and 3 of the First Amended Complaint, Defendant Land Department is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs and denies the same.

2. In answer to paragraph 4 of the First Amended Complaint, Defendant Land Department, denies that this Court has jurisdiction as to the First Amended Complaint.

3. In answer to paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the first Amended Complaint, Defendant Land Department is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs and denies the same.

4. In answer to paragraph 16, Defendant Land Department admits Susumu Ono is the Chairperson of the Department of Land and Natural Resources; however,

denies the remaining allegations contained in paragraph 16.

5. In answer to paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 81, 82, 83, 84, and 85 the State is without knowledge or information sufficient to form a belief as to the truth of the allegations of the foregoing paragraphs and, therefore denies the same.

6. The Defendant Land Department denies the allegations contained within paragraphs 76, 77, 78, 79 and 80 of the First Amended Complaint.

7. As to any and all other allegations of the First Amended Complaint not specifically admitted the State denies the same.

WHEREFORE, the Defendant, Land Department, prays that the First Amended Complaint filed herein be dismissed and the Defendant, Land, Department be awarded its costs, including reasonable attorneys fees and, further, such other relief as this Court may deem just and proper.

DATED: Honolulu, Hawaii, March 21, 1986.

STATE OF HAWAII

By /s/ Chelun Huang
Chelun Huang
EDWIN P. WATSON
Deputy Attorneys General
Attorneys for Defendant
Susumu Ono, in his
capacity as Chairperson
of the Hawaii Board of
Land and Natural
Resources

APPENDIX "K"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, SIERRA CLUB, and HAWAI'I AUDUBON SOCIETY, Plaintiffs, vs. JOHN O. MARSH, in his capacity as the Secretary of the Army; COL. MICHAEL M. JENKS, in his capacity as District Engineer, U.S. Army Corps of Engineers; LEE THOMAS, in his capacity as Administrator, U.S. Environmental Protection Agency; JUDITH AYRES, in her capacity as Regional Administrator of the U.S. EPA Region IX; TRANSCONTINENTAL DEVELOPMENT COMPANY, ATPAC LAND COMPANY, LESLIE S. MATSUBARA, in his capacity as the director of the Department of Health, State of Hawaii,	CIVIL NO. 85-1523 STIPULATION FOR DISMISSAL WITH PREJUDICE OF COUNTS I, II, III, V AND VI OF FIRST AMENDED COMPLAINT AND ORDER FILED MAY 19 1986 [Trial Date: 09-03-86]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, et al. v. JOHN O. MARSH, et al.
CIVIL NO. 85-1523

STIPULATION FOR DISMISSAL
WITH PREJUDICE OF COUNTS
I, II, III, V AND VI
OF THE FIRST AMENDED
COMPLAINT AND ORDER

SUSUMU ONO, in his capacity as director of the Department of Land and Natural Resources, State of Hawaii,

Defendants.

STIPULATION FOR DISMISSAL WITH PREJUDICE OF COUNTS I, II, III, V AND VI OF THE FIRST AMENDED COMPLAINT

WHEREAS the parties have reached a partial settlement of this case embodied in a Settlement Agreement effective May 19, 1986;

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), that Counts I, II, III, V and VI of the First Amended Complaint shall be, and the same hereby are, dismissed with prejudice, each party to bear its own costs.

DATED: Honolulu, Hawaii, May 14, 1986.

/s/ Michael Sherwood
MICHAEL SHERWOOD
Attorney for Plaintiffs
Sierra Club and
Hawaii Audubon Society

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, et al. v. JOHN O. MARSH, et al.
CIVIL NO. 85-1523

STIPULATION FOR DISMISSAL WITH PREJUDICE OF COUNTS I, II, III, V AND VI OF THE FIRST AMENDED COMPLAINT AND ORDER

/s/ Alan T. Murakami
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Mervin Napeahi

/s/ Florence Nakakuni
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/s/ Chelun Huang
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Assistant Attorneys General
Attorneys for Defendant
Susumu Ono

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, et al. v. JOHN O. MARSH, et al.
CIVIL NO. 85-1523

STIPULATION FOR DISMISSAL WITH PREJUDICE OF COUNTS I, II, III, V, AND VI OF THE FIRST AMENDED COMPLAINT AND ORDER

/s/ Lisa Woods Munger
RONALD H.W. LUM
JACQUELINE L. S. EARLE
LISA WOODS MUNGER
PAMELA MURCH BLISS
WALLACE S. FUJIYAMA
RODNEY M. FUJIYAMA
HOLLY T. SHIKADA
Attorneys for Defendants
Transcontinental
Development Co. and
Atpac Land Co.

APPROVED AND SO ORDERED:

/s/ Harold M. Fong
JUDGE OF THE ABOVE-ENTITLED COURT

APPENDIX "L"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

MERVIN NAPEAHI, individually and on behalf of all those similarly situated, Plaintiff, vs. SUSUMU ONO, in his capacity as director of the Department of Land and Natural Resources, State of Hawaii Defendant.	CIVIL NO. 85-1523 SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FILED JUN 30 1986

SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

1. Pursuant to 42 U.S.C. § 1983 Plaintiff petitions this Court to declare that the 1984 recertification of the shoreline by Defendant ONO in the vicinity of the Waikoloa Beach Resort in South Kohala, Island of Hawaii resulted in the uncompensated loss and abandonment of ceded lands. This loss constitutes a breach of the ceded land trust created by Section 5(f) of the Hawaii State Admission Act. This breach also constitutes a deprivation of federal right under color of state law. Accordingly, Plaintiff seeks to enjoin Defendant ONO from refraining from his nondiscretionary duty to protect the ceded land trust.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1361. The claims arise under Section 5(f) of the Hawaii State Admission Act of 1959.

PARTIES

3. Plaintiff MERVIN NAPEAHI is a 45 year-old resident of Honalo, Kona, Hawai'i. He has frequented the area on the island of Hawai'i known as Waiulua Bay, adjacent to the ahupua'a of Waikoloa to gather fish, opae, and other marine food products like opihi, limu, and squid from the sea, tidal pools and anchialine ponds in the area for subsistence purposes, and to camp and enjoy the aesthetic, open space, marine, and terrestrial resources of the area. As a pure Hawaiian he is a beneficiary of the ceded lands trust established by Section 5(f) of the Hawaii State Admission Act of 1959.

4. Defendant SUSUMU ONO is the director of the State of Hawaii Department of Land and Natural Resources, the state agency encharged with the trust duty to protect and manage the ceded land trust, in part, for the benefit of native Hawaiians. He is also ultimately responsible for any shoreline certifications issued by the state.

FACTUAL ALLEGATIONS

5. On October 27, 1976 Christopher Cobb, then chairman of the Board of Land and Natural Resources, accepted the certified shoreline for TMK: 6-9-07:14, 16

and 26 as indicated on the maps labeled "File Plan 1256 – Waikoloa Beach Resort Phase I (Revised Feburary 1976)," and "File Plan 1562-Waikoloa Beach Resort Phase I (Amended)", dated June 1978.

6. On May 10, 1984 Transcontinental Development Company (hereinafter referred to as the "private landowner") requested a recertification of the shoreline along the proposed Waikoloa Beach Resort designated as TMK: 6-0-07:14, 16 and 26 as shown on the map labeled "File Plan 1256-Waikoloa Beach Resort Phase I" which was dated March 14, 1972 and recorded in the Bureau of Conveyances on March 28, 1972.

7. On October 15, 1984 the private landowner made a second request for recertification of the Waikoloa Beach Resort shoreline to a position makai of the 1976 certified shoreline.

8. On October 25, 1984, without prior public hearing or notice, Defendant ONO recertified the shoreline for TMK: 6-9-07:14, 16 and 26 to a position more makai of the shoreline as had previously been certified on Revised File Plan Map 1256 and File Plan Map 1562, and as shown on the map labeled "Shoreline Certification Plan of Waikoloa Beach Resort Phase I (Amended) (File Plan 1562)".

9. In January, 1986, the private landowners filled in approximately 1-3 acres of submerged lands makai of the 1976 designated shoreline in conjunction with their construction of the planned Waikoloa resort.

10. In this process the private landowner filled in tidepools and open anchialine ponds which were once

delineated as submerged lands in the 1976 shoreline surveys.

11. Portions of the property that the private landowner designated for use as a swimming lagoon and hotel site, prior to site preparation work conducted in January, 1986, were situated makai of the 1976 shoreline.

12. The loss of these submerged lands from this construction will result in a direct economic benefit to the private landowners at the expense of the state of Hawaii, which will receive no compensation from the abandonment.

13. These submerged lands are included in the ceded lands trust, which the U.S. created, *inter alia*, for the betterment of native Hawaiians, like Plaintiff NAPEAHI.

CLAIM FOR RELIEF: DEPRIVATION OF CIVIL RIGHTS UNDER COLOR OF STATE LAW

14. Under 42 USC § 1983, no person, under color of state law, may deprive another of rights which arise under the constitution and laws of the United States. Under the 14th Amendment to the U.S. Constitution, a state may not deprive a person of property without just compensation and due process of law.

15. Under Section 5(f) of the Admission Act, the State of Hawaii administers a ceded land trust, the lands, revenues and proceeds of which are specifically earmarked, for various public purposes, including the betterment of conditions of Native Hawaiians. The use of

these lands, proceeds and income for any other purpose is a breach of that trust duty.

16. The submerged lands seaward of the state's certified shoreline are part of this ceded land trust.

17. Under H.R.S. § 205-31, the "shoreline" is the upper reaches of the wash of waves, other than storm and tidal waves.

18. Nevertheless, by recertifying the shoreline below the upper reaches of the wash of waves, contrary to the definition of H.R.S. § 305-31 and the previous 1976 survey, Defendant ONO and his department arbitrarily delineated the official shoreline along Waiulua Bay.

19. By altering the certified shoreline along Waiulua Bay at Waikoloa without public notice or hearing under color of state law, Defendant ONO and the Department of Land and Natural Resources arbitrarily reduced the corpus of the ceded land trust by 1-3 acres of submerged land, for the private benefit of the private landowner, contrary to the express purposes of the trust under Section 5(f) of the Admission Act.

20. Accordingly, Defendant ONO and his department breached fiduciary duties to Plaintiff under Section 5(f) of the Admission Act and violated 42 U.S.C. § 1983.

21. By this act, Defendant ONO, and the Department of Land and Natural Resources he administers, also denied the beneficiaries of that trust, due process and just compensation under the 14th Amendment. As a native Hawaiian who is a beneficiary of this trust Plaintiff NAPEAHI has been injured by the uncompensated abandonment of approximately three acres of ceded land, for

use by the private landowner, caused by the arbitrary alteration of the certified shoreline by the Department of Land and Natural Resources.

22. Accordingly, Defendant ONO and his department acted under color of state law to violate the due process and statutory rights of Plaintiff, pursuant to 42 U.S.C. § 1983, entitling Plaintiff NAPEAHI to appropriate relief and his costs and attorneys' fees under 42 U.S.C. § 1988.

PRAYER FOR RELIEF

THEREFORE, Plaintiff hereby prays that this court:

1. assume jurisdiction over this action;

2. declare that the October 25, 1984 recertification of the shoreline at the tip of Waiulua Bay resulted in the arbitrary abandonment of ceded lands without compensation to the State of Hawaii.

3. order Defendant ONO to conduct further proceedings to determine the reasonable value of the submerged land abandoned by Defendant ONO to the private landowner so he can demand appropriate compensation.

4. enjoin Defendant ONO from further recertification of shorelines in the State of Hawaii which result in the abandonment of ceded lands to private interests, without public hearing or notice, compensation or explanation.

5. grant Plaintiff NAPEAHI his costs and attorneys' fees under 42 U.S.C. § 1988.

6. grant such other relief as it determines just and equitable including any necessary preliminary relief to preserve the rights of the Plaintiff.

DATED: Honolulu, Hawai'i, June 30, 1986.

/s/ Alan T. Murakami
ALAN T. MURAKAMI
LIVIA WANG
Attorneys for Plaintiff

APPENDIX "M"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MERVIN NAPEAHI, Plaintiff, vs. SUSUMU ONO, in his capacity as Chairperson of the Board of Land and Natural Resources, State of Hawaii Defendant.	CIVIL NO. 85-1523 ANSWER OF DEFENDANT, SUSUMU ONO, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, TO PLAINTIFF'S SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

FILED JUL 21 1986

ANSWER OF DEFENDANT, SUSUMU ONO, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, TO PLAINTIFF'S SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Comes now Defendant, SUSUMU ONO, in his official capacity as Chairperson of the Board of Land and Natural Resources, State of Hawaii, hereinafter referred to as the "Land Department," through his attorneys Corinne K. A. Watanabe, Attorney General of the State of Hawaii, and Chelun Huang and Edwin P. Watson, Deputy Attorneys General, and answer the Second Amended complaint filed herein as follows:

FIRST DEFENSE:

1. The Second Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE:

2. Plaintiff has failed to pursue and exhaust Administrative and Legal remedies available through state statutes, and county ordinances, and the State Court System.

THIRD DEFENSE:

3. Plaintiff's claims are barred by the equitable doctrine of laches, waiver, unclean hands, and/or estoppel.

FOURTH DEFENSE:

4. In answer to Paragraphs 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 of the Second Amended Complaint, Defendant Land Department is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs and denies the same.

5. In answer to Paragraph 4, Defendant Land Department admits that Susumu Ono is the Chairperson of the Board of Land and Natural Resources; however, denies the remaining allegations contained in Paragraph 4.

6. As to any and all allegations of the Second Amended Complaint not specifically admitted the State denies the same.

FIFTH DEFENSE:

7. The Second Amended Complaint requires a court determination of whether the subject tidal pools and ponds are private lands or public lands and, further, prays that Defendant Ono be ordered to seek compensation from the landowner for the value of the subject lands; therefore, the Second Amended Complaint fails to join as necessary parties to this action the landowners, TRANSCONTINENTAL DEVELOPMENT COMPANY, ATPAC LAND COMPANY, and THE HYATT CORPORATION.

8. The Second Amended Complaint challenges the shoreline determination of the subject property pursuant to County of Hawaii regulations and, therefore, fails to join as a necessary party the County of Hawaii, a body corporate and politic in the State of Hawaii.

WHEREFORE, the Defendant, Land Department, prays that the Second Amended Complaint filed herein be dismissed and the Defendant, Land Department, be awarded its costs, including reasonable attorneys fees and, further, such other relief as this court may deem just and proper.

DATED: Honolulu, Hawaii, July 18, 1986.

STATE OF HAWAII

By /s/ Chelun Huang
CHELUN HUANG
EDWIN P. WATSON
Deputy Attorneys General

Attorneys for Defendant SUSUMU ONO, in his capacity as Chairperson of the Board of Land and Natural Resources, State of Hawaii

APPENDIX "N"

The Hawaii Constitution of 1978, Article 12, provides in pertinent part that

PUBLIC TRUST

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public. [Add Const Con 1978 and election Nov 7, 1978]

Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members. [Add Const Con 1978 and election Nov 7, 1978]

Section 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale

or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board. [Add Const Con 1978 and election Nov 7, 1978]

Chapter 10, Hawaii Revised Statutes (1985) provides that

[§10-1] Declaration of purpose. (a) The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.

(b) It shall be the duty and responsibility of all state department and instrumentalities of state government providing services and programs which affect native

Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs. [L 1979, c 196, pt of §2]

[§10-2] Definitions. In this chapter, if not inconsistent with the context:

"Administrator" means the administrator of the office of Hawaiian affairs;

"Beneficiary of the public trust entrusted upon the office" means native Hawaiians and Hawaiians;

"Board" means the board of trustees;

"Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii;

"Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii;

"Office" means the office of Hawaiian affairs. [L 1979, c 196, pt of §2]

[§10-3] Purpose of the office. The purpose of the office of Hawaiian affairs include:

(1) The betterment of conditions of native Hawaiians. A pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States Under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e);

(2) The betterment of conditions of Hawaiians;

(3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission;

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

(5) Applying for, receiving, and disbursing, grants and donations from all sources of native Hawaiian and Hawaiian programs and services; and

(6) Serving as a receptacle for reparations [L 1979, c 196, pt of §2]

[§10-4] Office of Hawaiian affairs; established; general powers. There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The office, under the direction of the board of trustees, shall have the following general powers:

(1) To adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law;

(2) To acquire in any lawful manner any property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose;

(3) To determine the character of the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office of Hawaiian affairs;

(4) To enter into and perform such contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof, or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate;

(5) To execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers; and

(6) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law. [L 1979, c 196, pt of §2]

[§10-5] Board of trustees; powers and duties. The board shall have the power in accordance with law to:

(1) Manage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 10-3, of this chapter;

(2) Exercise control over real and personal property set aside to the office of the State of Hawaii, the United States of America, or any private sources, and transferred to the office for native Hawaiians and Hawaiians;

(3) Collect, receive, deposit, withdraw, and invest money and property on behalf of the office;

(4) Formulate policy relating to the affairs of native Hawaiians and Hawaiians, provided

that such policy shall not diminish or limit the benefits of native Hawaiians under Article XII, section 4, of the state Constitution;

(5) Otherwise act as a trustee as provided by law;

(6) Delegate to the administrator, its officers and employees such powers and duties as may be proper for the performance of the powers and duties vested in the board;

(7) Provide grants to public or private agencies for pilot projects, demonstrations, or both, where such projects or demonstrations fulfill criteria established by the board;

(8) Make available technical and financial assistance and advisory services to any agency or private organization for native Hawaiian and Hawaiian programs, and for other functions pertinent to the purposes of the office of Hawaiian affairs. Financial assistance may be rendered through contractual arrangements as may be agreed upon by the board and any such agency or organization; and

(9) Adopt and use a common seal by which all official acts shall be authenticated. [L 1979, c 196, pt of §2]

[§10-6] General duties of the board. (a) The general duties of the board shall be:

(1) To develop, implement, and continually update a comprehensive master plan for native Hawaiians and Hawaiians which shall include, but not be limited to, the following:

(A) Compilation of basic demographic data on native Hawaiians and Hawaiians;

(B) Identification of the physical, sociological, psychological, and economic needs of native Hawaiians and Hawaiians;

(C) Establishment of immediate and long-range goals pursuant to programs and services for native Hawaiians and Hawaiians;

(D) Establishment of priorities for program implementation and of alternatives for program implementation; and

(E) Organization of administrative and program structure, including the use of facilities and personnel;

(2) To assist in the development of state and county agency plans for native Hawaiian and Hawaiian programs and services;

(3) To maintain an inventory of federal, state, county, and private programs and services for Hawaiians and native Hawaiians and act as a clearinghouse and referral agency;

(4) To advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians;

(5) To conduct, encourage, and maintain research relating to native Hawaiians and Hawaiians;

(6) To develop and review models for comprehensive native Hawaiian and Hawaiian programs;

(7) To act as a clearinghouse for applications for federal or state assistance to carry out native Hawaiian or Hawaiian programs or projects;

(8) To apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians; and

(9) To promote and assist the establishment of agencies to serve native Hawaiians and Hawaiians.

(b) The board shall have any powers which may be necessary for the full and effective performance and discharge of the duties imposed by this chapter, and which may be necessary to fully and completely effectuate the purposes of this chapter. [L 1979, c 196, pt of §2]

[§10-7] Board of trustees. The office of Hawaiian affairs shall be governed by a board to be officially known as the board of trustees, office of Hawaiian affairs. Members of the board shall be elected in accordance with chapter 13D, with reference to sections 11-15, 11-25, 12-5, 12-6, and vacancies shall be filled in accordance with section 17-7. [L 1979, c 196, pt of §2]

[§10-8] Organization; quorum; meeting. The board, at its first meeting after an election, shall elect from its own membership a chairperson and a vice-chairperson who shall serve at the pleasure of the board. Their election shall be immediately certified by the board to the lieutenant governor.

A majority of all members to which the board is entitled shall constitute a quorum to do business. The concurrence of a majority of all members to which the

board is entitled shall be necessary to make any action of the board valid; provided that due notice shall be given to all members.

Meetings shall be called and held at the call of the chair or by a quorum, as often as may be necessary for transaction of the board's business. The board shall meet at least once annually on each of the islands of Hawaii, Maui, Molokai, Lanai, Kauai, and Oahu. [L 1979, c 196, pt of §2; am L 1985, c 158, §1]

[§10-9] Compensation; expense. Members of the board shall be allowed:

(1) Compensation at the rate of $50 a day for each day's actual attendance at meeting;

(2) Transportation fares between islands and abroad; and

(3) Personal expenses at the rates specified by section 78-15, while attending board meetings or while on official business as authorized by the chairperson, when such board meetings or official business shall require a member to leave the island upon which the member resides. [L 1979, c 196, pt of §2; am L 1981, c 148, §1]

[§10-10] Administrator; appointment, tenure, removal. The board by a majority vote, shall appoint an administrator who shall serve without regard to the provisions of chapters 76 and 77 for a term to be determined by the board. The board, by a two-thirds vote of all members to which it is entitled, may remove the administrator for cause at any time. [L 1979, c 196, pt of §2]

[§10-11] Salary of the administrator. The salary of the administrator shall be established by the board;

provided that such salary shall not exceed the salary of department heads or executive officers established by law. The administrator shall be included in any benefit program generally applicable to officers and employees of the State. [L 1979, c 196, pt of §2; am L 1981, c 130, §2]

[§10-12] Assistant; staff. The administrator may employ and retain such officers and employees as may be necessary, subject to the approval of the board, to carry out the functions of the office. Such officers and employees may he hired without regard to chapters 76 and 77, and shall serve at the pleasure of the administrator. Officers and employees of the office of Hawaiian affairs shall be included in any benefit program generally applicable to officers and employees of the State. [L 1979, c 196, pt of §2]

[§10-13] Appropriations; accounts; reports. Moneys appropriated by the legislature for the office shall be payable by the director of finance, upon vouchers approved by the board, or by any officer elected or appointed by the board and authorized by the board to approve such vouchers on behalf of the board. All moneys received by or on behalf of the board shall be deposited with the director of finance and kept separate from moneys in the state treasury; except that any moneys received from the federal government or from private contributions shall be deposited and accounted for in accordance with conditions established by the agencies or persons from whom the moneys are received; and except that with the concurrence of the director of finance, moneys received from the federal government for research, training, and other related purposes of a transitory nature, and moneys in trust or revolving funds

administered by the office, shall be deposited in depositories other than the state treasury and shall be reported on to the state comptroller under section 40-81, and rules prescribed thereunder. Income derived from the sale of goods or services and income from lands and property as described in section 10-3, shall be credited to special or other funds; provide that upon the recommendation of the office, the comptroller shall establish such other separate accounts or special funds for other designated revenues as may be directed by the board or its authorized representative [L 1979, c 196, pt of §2; am L 1981, c 37, §2]

[§10-13.5 Use of the public land trust proceeds.] Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter. [L 1980, c 273, § 1]

[§10-14] Budget auditing. (a) Not less than twenty days before the legislature convenes in every odd-numbered year, the board shall submit to the legislature and to each member thereof, a budget which shall contain the recommendations of the board for the succeeding two fiscal years.

(b) Not less than twenty days before the legislature convenes in an even-numbered year, the board may submit to the legislature a supplemental budget to amend any appropriations for the current fiscal biennium or prior fiscal periods.

(c) The office shall be subject to government audit. [L 1979, c 196, pt of §2; am L 1982, c 224, §2]

[§10-15] Annual report. The board shall prepare and make public their annual report which shall include an enumeration of their activities, income, and expenditures during the year. The annual report shall be submitted to the governor and the legislature ten days prior to the convening of each regular session of the legislature. The board shall prepare and submit special reports as may be required by the legislature. [L 1979, c 196, pt of §2]

[§10-16] Suits. (a) The office may sue and be sued in its corporate name. The State shall not be liable for any acts or omissions of the office, its officers, employees, and the members of the board of trustees, except as provided under subsection (b).

(b) In matters of tort, the office, its officers and employees, and the members of the board shall be subject to suit only in the manner provided for suits against the State under chapter 662.

(c) In matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private council.

(d) In matters involving other forms of remedies, the office, its officers and employees, and the members of the board shall be subject to suit as provided by any other provision of law and by the common law. [L 1979, c 196, pt of §2]

The Act of July 3, 1990, 1990 Haw. Sess. L. 947, provides

ACT 304

H.B. NO. 2896

A Bill for an Act Relating to the Office of Hawaiian Affairs.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that Act 273, Session Laws of Hawaii 1980, amended chapter 10, Hawaii Revised Statutes, to authorize the office of Hawaiian affairs to expend twenty per cent of all funds derived from the public land trust, as described in section 10-3, for the betterment of the conditions of native Hawaiians. In the *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Hawaii 154, 737 P.2d 446 (1987), *certiorari denied*, 108 S.Ct. 234, 484 U.S. 898, 98 L.Ed.2d 192 (1987), the Hawaii supreme court ruled that section 10-3 did not support the claim of the office of Hawaiian affairs to twenty per cent of a settlement reached by the State in its litigation with Molokai Ranch and that legislative clarification of section 10-13.5, Hawaii Revised Statutes, was necessary to resolve facial statutory inconsistencies and to establish the funding of the office of Hawaiian affairs under chapter 10 because of a lack of judicially discoverable or manageable standards adequate to permit a judicial determination thereof. The legislature further finds that as a consequence thereof the office of Hawaiian affairs has been provided only a portion of the funds contemplated upon enactment of section 10-13.5 in 1980. Chapter 10 provides that the beneficiary of the public trust

entrusted upon the office of Hawaiian affairs means native Hawaiians and Hawaiians. This Act addresses only the native Hawaiian beneficiary. Discussions are still occurring regarding the provision of benefits to the Hawaiian beneficiary under the public trust entrusted upon the office of Hawaiian affairs. The legislature finds that there is no evidence to support payment of any past due revenues to Hawaiians as beneficiaries under the public land trust entrusted upon the office of Hawaiian affairs.

The purposes of this Act are to:

(1) Clarify the lands comprising the public land trust under chapter 10, Hawaii Revised Statutes;

(2) Clarify the revenues derived from the public land trust which shall be considered to establish the amount of funding to the office of Hawaiian affairs for the purpose of the betterment of the conditions of native Hawaiians; and

(3) Provide for a process to determine the actual amounts payable to the office under the clarified standards enacted and for the formulation of a plan for payment of that sum consistent with the restrictions and limitations under the existing federal and state laws and regulations, and bond and contractual obligations.

This Act is not intended to replace or affect the claims of native Hawaiians and Hawaiians with regard to reparations from the federal government.

SECTION 2. In accordance with Section 9 of Article VII of the Constitution of the State of Hawaii and sections

37-91 and 37-93, Hawaii Revised Statutes, the legislature has determined that the appropriation contained in this Act will cause the state general fund expenditure ceiling for fiscal year 1990-1991 to be exceeded by $7,700,000, or 0.30 per cent. The reasons for exceeding the general fund expenditure ceiling are that the appropriation made in this Act is necessary to serve the public interest and to meet the need provided for by this Act.

SECTION 3. Section 10-2, Hawaii Revised Statutes, is amended to read as follows:

"**[[]§10-2[]] Definitions.** In this chapter, if not inconsistent with the context:

"Administrator" means the administrator of the office of Hawaiian affairs[;].

"Beneficiary of the public trust entrusted upon the office" means native Hawaiians and Hawaiians[;].

"Board" means the board of trustees[;].

"Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii[;].

"Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands

in 1778 and which peoples thereafter continued to reside in Hawaii[;].

"Office" means the office of Hawaiian affairs.

"Public land trust" means those lands:

(1) Which were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and which were conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admission Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended);

(2) Retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, and later conveyed to the State under section 5(e) of the Act of March 18, 1959; and

(3) Which were ceded to and retained by the United States under section 5(c) and 5(d) of the Act of March 18, 1959 and later conveyed to the State pursuant to the Act of December 23, 1963 (P.L. 88-233, 77 Stat. 472).

"Revenue" means all proceeds, fees, charges, rents, or other income, or any portion thereof, derived from any sale, lease, license, permit, or other similar proprietary disposition, permitted use, or activity, that is situated upon and results from the actual use of lands comprising the public land trust, and including any penalties or levies exacted as a result of a violation of the terms of any proprietary disposition, but excluding any income, proceeds, fees, charges, or other moneys

derived through the exercise of sovereign functions and powers including:

(1) Taxes;

(2) Regulatory or licensing fees;

(3) Fines, penalties, or levies;

(4) Registration fees;

(5) Moneys received by any public educational institution, including the University of Hawaii, and the community college system, from its educational programs and ancillary services, such as tuition, registration fees, meals, books, grants, or scholarships;

(6) Interagency and intra-agency administrative fees or assessments;

(7) Moneys derived from or provided in support of penal institutions and programs;

(8) Grants, carry-overs, and pass-throughs;

(9) Federal moneys, including federal-aid, grants, subsidies, and contracts;

(10) Moneys collected from the sale or dissemination of government publications; and

(11) Department of defense proceeds on state-improved lands."

SECTION 4. Section 10-3. Hawaii Revised Statutes, is amended to read as follows:

"**[[]§10-3[]] Purpose of the office.** The purposes of the office of Hawaiian affairs include:

(1) The betterment of conditions of native Hawaiians[. A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by

the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e)];

(2) The betterment of conditions of Hawaiians;

(3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission;

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

(5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and

(6) Serving as a receptacle for reparations."

SECTION 5. Section 10-5, Hawaii Revised Statutes, is amended to read as follows:

"**[[]§10-5[]] Board of trustees; powers and duties.** The board shall have the power in accordance with law to:

(1) Manage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all [income and proceeds from] *moneys received by the office equivalent to* that pro rata portion of the [trust] *revenue derived from the public land trust* referred to in section [10-3, of this chapter;] *10-2;*

(2) Exercise control over real and personal property set aside to the office by the State of Hawaii, the United States of America, or any private sources, and transferred to the office for native Hawaiians and Hawaiians;

(3) Collect, receive, deposit, withdraw, and invest money and property on behalf of the office;

(4) Formulate policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits of native Hawaiians under Article XII, section 4, of the state Constitution;

(5) Otherwise act as a trustee as provided by law;

(6) Delegate to the administrator, its officers and employees such powers and duties as may be proper for the performance of the powers and duties vested in the board;

(7) Provide grants to public or private agencies for pilot projects, demonstrations, or both, where [such] *those* projects or demonstrations fulfill criteria established by the board;

(8) Make available technical and financial assistance and advisory services to any agency or private organization for native Hawaiian and Hawaiian programs, and for other functions pertinent to the purposes of the office of Hawaiian affairs. Financial assistance may be rendered through contractual arrangements as may be agreed upon by the board and any such agency or organization; and

(9) Adopt and use a common seal by which all official acts shall be authenticated."

SECTION 6. Section 10-13. Hawaii Revised Statutes, is amended to read as follows:

"**§10-13 Appropriations; accounts; reports.** (*a*) Moneys appropriated by the legislature for the office shall be payable by the director of finance, upon vouchers approved by the board, or by any officer elected or appointed by the board and authorized by the board to approve [such] *the* vouchers on behalf of the board. All moneys received by or on behalf of the board shall be deposited with the director of finance and kept separate from moneys in the state treasury; except that any moneys received from the federal government or from

private contributions shall be deposited and accounted for in accordance with conditions established by the agencies or persons from whom the moneys are received; and except that with the concurrence of the director of finance, moneys received from the federal government for research, training, and other related purposes of a transitory nature, and moneys in trust or revolving funds administered by the office, shall be deposited in depositories other than the state treasury and shall be reported on to the state comptroller under section 40-81, and rules prescribed thereunder.

(*b*) Income derived from the sale of goods or services and [income from lands and property as described in section 10-3,] *all moneys received by the office equivalent to that pro rata portion of the revenue derived from the public land trust described in section 10-2,* shall be credited to special or other funds; provided that upon the recommendation of the office, the comptroller shall establish such other separate accounts or special funds for other designated revenues as may be directed by the board or its authorized representative."

SECTION 7. Section 10-13.5, Hawaii Revised Statutes, is amended to read as follows:

"**[[]§10-13.5 Use of public land trust proceeds.[]]** Twenty per cent of all [funds] *revenue* derived from the public land trust[, described in section 10-3.] shall be expended by the office[, as defined in section 10-2,] for the [purposes of this chapter.] *betterment of the conditions of native Hawaiians.*"

SECTION 8. The department of budget and finance and the office of Hawaiian affairs shall determine the

actual amount equivalent to twenty per cent of the revenue under sections 10-2 and 10-13.5 which is payable to the office, less any moneys appropriated and received under section 10 of this Act, or received by the office from the department of land and natural resources, or any other agency, pursuant to sections 10-2 and 10-13.5 during the period of June 16, 1980 through June 30, 1991. Interest on such actual amount, at the rate of six per cent a year, compounded annually, from June 16, 1980 to June 17, 1982, and at the rate of ten per cent a year, compounded annually from June 18, 1982, shall be added to such actual amount until paid.

Upon request of the office of Hawaiian affairs, all data relating to lands which comprise the public land trust and to the revenue derived therefrom, including the methodology for determining this revenue and the office of Hawaiian affairs' pro rata portion thereof, shall be subject to review by the office and an independent auditor selected by the office. The department of budget and finance shall respond to and, if appropriate, take action to resolve any concerns raised by the independent auditor.

The department of budget and finance shall submit to the legislature, not later than twenty days before the convening of the regular session of 1991, a proposed plan for the payment of such actual amount, including interest and for funding pursuant to sections 10-2 and 10-13.5 after June 30, 1991, and shall submit for introduction appropriate legislation to implement the plan.

The plan and implementing legislation submitted by the department of budget and finance shall reflect the

conveyance of any public land to the office by the department of land and natural resources proposed, in partial or full satisfaction of the actual amounts due the office, pursuant to section 9 of this Act.

SECTION 9. The department of land and natural resources, the office of state planning, and the office of Hawaiian affairs shall identify parcels of public land which may be conveyed to the office of Hawaiian affairs, in trust for the betterment of conditions of native Hawaiians, in full or partial satisfaction of the actual amounts determined by the department of budget and finance and the office of Hawaiian affairs to be payable to the office, including interest through June 30, 1991, pursuant to section 8 of this Act.

SECTION 10. The office of state planning, in cooperation with affected agencies, shall: (1) review existing policies, practices, and procedures for the utilization and disposition of lands which comprise the public land trust and for the determination of the consideration for these utilizations or dispositions; (2) evaluate the effect of existing policies, practices, and procedures on the revenue otherwise due to the office of Hawaiian affairs under chapter 10. Hawaii Revised Statutes; and (3) develop and assist in the implementations of appropriately revised policies, practices, and procedures and to ensure that the office of Hawaiian affairs receives its revenue entitlement promptly. The office of state planning shall prepare and submit a report on its findings and recommendations, including recommendations for appropriate legislation, to the legislature not later than twenty days before the convening of the regular session of 1991.

SECTION 11. There is appropriated out of the general revenues of the State of Hawaii the sum of $7,200,000, or so much thereof as may be necessary for fiscal year 1990-1991, to provide funds pursuant to sections 10-2 and 10-13.5. This appropriation shall be in addition to those moneys paid to the office by the department of land and natural resources pursuant to sections 10-2 and 10-13.5. The sum appropriated shall be expended by the office of Hawaiian affairs for the betterment of the conditions of native Hawaiians. The director of finance is authorized to deduct, from those special funds which derive revenue from lands identified in section 10-2, amounts which shall be transferred to the general fund of the State and become general realizations of the State for the purpose of reimbursing the general fund appropriation made for the fiscal year 1990-91. These transfers shall be made; provided that the director of finance determines that the expenditure of moneys from any such special fund is not contrary to any federal or state laws, or regulations, and is not contrary to any bond covenants, contractual commitments, grant agreements, or other limitations.

SECTION 12. There is appropriated out of the general revenues of the State of Hawaii the sum of $500,000, or so much thereof as may be necessary for fiscal year 1990-1991, to obtain land surveys, conduct public informational meetings, pay for transportation costs, and to otherwise carry out the purposes of this Act. The sum appropriated shall be expended by the office of state planning.

SECTION 13. Should the expenses for surveys and appraisals required under this Act exceed the general fund appropriation made under this section, the director

of finance, with the approval of the governor, is authorized to utilize savings as determined to be available from programs within the office of state planning.

SECTION 14. The office of Hawaiian affairs shall submit an annual report to the governor and the legislature not less than thirty days before the convening of each regular session. The report shall describe the use of the public land trust proceeds for the betterment of the conditions of the native Hawaiians and provide detailed information, including, but not limited to, the following:

(1) Statements of statewide objectives and program objectives;

(2) Program plans that describe the programs that implement the statewide objectives and program objectives;

(3) Program performance reports that assess the effectiveness in attaining the objectives;

(4) Program costs; and

(5) Long-range financial plans.

SECTION 15. Nothing contained in this Act shall impair or be deemed to impair the rights and privileges of the holders of indebtedness outstanding as of the effective date of this Act and payable from moneys in any special fund, including the airport revenue fund, harbor special fund, or the second separate harbor special fund. If and to the extent the application of moneys in any special fund, as heretofore provided by any certificate securing any revenue bonds, including airport and harbor revenue bonds, is construed to be inconsistent with the provisions of this Act, such moneys shall continue to be applied in accordance with such certificate so long as

any airport revenue bonds, including airport and harbor revenue bonds, secured thereby remain outstanding.

SECTION 16. The provisions of this Act shall be enforced to the extent they are not held to conflict with any federal or state law, rules, or regulations. The provisions of this Act are not severable and if any provision of the Act, or the application thereof to any person or circumstance is held to conflict with any federal or state law, rules, or regulations, this Act, in its entirety, shall be invalid and sections 10-2, 10-3, 10-5, 10-13 and 10-13.5, Hawaii Revised Statutes, shall be reenacted in the form in which they read on the day before the approval of this Act.

SECTION 17. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 18. This Act shall take effect upon its approval; provided that the provisions of sections 3, 4, 5, 6, and 7 of this Act shall be applied retroactively to June 16, 1980, and that sections 11 and 12 shall take effect on July 1, 1990.

(Approved July 3, 1990.)

Chapter 205, Hawaii Revised Statutes (1985), provides in pertinent part that:

§ 205-31 Definitions. As used in this part, unless the context otherwise requires:

"Shoreline" means the upper reaches of the wash of waves, other than storm and tidal waves, usually evidenced by the edge of vegetation growth, or the upper line of debris left by the wash of waves.

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-1937

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

Petitioner,

vs.

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court should accept certiorari to review any issue raised for the first time on appeal before this court in a case which does not call into question issues of wide import or applicability under the laws of the United States.

2. Whether this Court should consider the issue of respondent's standing in light of the paucity of facts on the record due to the failure of Petitioner to raise the issue below.

3. Whether Petitioner waived his Eleventh Amendment immunity when the state voluntarily appeared before the Ninth Circuit without raising this defense or any other now in his petition.

4. Whether this Court should defer this petition until the lower courts can adjudicate whether the Eleventh Amendment should be a bar to the action, since those courts have not yet fashioned appropriate remedies for relief.

5. Whether Petitioner has waived his right to object to the availability of a right of action under 42 U.S.C § 1983 by failing to raise this defense before the lower courts.

6. Whether Petitioner has waived seek abstention from this court by voluntarily appearing before the Ninth Circuit to defend and litigate the issues on the merits without objection.

3. Whether on the record before it, the Ninth Circuit decision reveals conflicts with prior decisions of this Court or other circuits as to:

   a. The standing of Respondent to seek redress for violations of the § 5(f) trust.

   b. The possible relief sought by Respondent to remedy a continuing violation of federal law.

   c. The right of Mr. Napeahi as a native Hawaiian to enforce the § 5(f) trust in an action under 42 U.S.C § 1983?

   b. Deferring to state tribunals in matters involving a breach of the § 5(f) trust.

   d. The assumption of federal question jurisdiction to consider the Respondent's claim for enforcement of the § 5(f) trust.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Mervin Napeahi hereby opposes the petition of William F. Paty, Director of the Department of Land and Natural Resources, State of Hawaii, for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on December 18, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Paragraph 3 of the Joint Resolution of Annexation of July 7, 1898 provides:

> The existing land laws of the United States relative to public lands shall not apply to such land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

The Hawaii Admission Act § 5(f) provides:

> (f) The lands granted to the state of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other education institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and

> no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Article XII, § 4 of the Hawaii State Constitution provides:

> The lands granted to the State of Hawaii by § 5(b) of the Admission Act and pursuant to Article XII, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by § 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

SUMMARY OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

This petition simply does not raise issues of such importance to merit review by this court. The applicability of the Ninth Circuit's decision is narrowly limited to the circumstances and law governing Hawai'i. Contrary to Petitioner's exaggerated perspective of the impact of the decision on other Western states, the Ninth Circuit ruling is confined to the operation of the unique trust imposed by the Hawaii Admission Act, § 5(f), in part for the benefit of native Hawaiians.

Furthermore, Petitioner raised none of the four major issues cited in the Petition before the Ninth Circuit. As such, two issues (a right of action under 42 U.S.C. § 1983, abstention) have been waived. The other two issues (United States Constitution, Article III standing and Eleventh Amendment sovereign immunity) may be raised and considered in this court's discretion. Nevertheless, this court should also deny certiorari because: (1) the standing claims are so heavily dependent on factual findings best left for the lower courts in the first instance; (2) the Ninth Circuit Court never ruled, and left no guidance, on the Eleventh Amendment

sovereign immunity claim being raised anew before this Court, and (3) there is no inconsistency between this Court's decisions on these issues and the Ninth Circuit's decision. Petitioner's failure to raise any of these issues before the Ninth Circuit is completely inconsistent with the alleged significance he attributes to the impact of this case.

Therefore, this Court should deny this petition.

I. THE SCOPE OF THE IMPACT OF THE NINTH CIRCUIT DECISION DOES NOT JUSTIFY REVIEW BY THIS COURT.

Rule 10, Supreme Court Rules, provides that:

> A review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

The essence of this rule has not always been appreciated by counsel for those petitioning for certiorari, who may have been mistakenly motivated merely to seek another hearing. Magnum Co. v. Coty, 262 U.S. 159, 163 (1934). As former Chief Justice Vinson indicated:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. ... The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. ... To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. ... (emphasis added)

R. Stern, E. Gressman, and S.M. Shapiro, Supreme Court Practice, 190-91 (6th Ed.), citing Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi.

A. The Petition does not raise important federal questions of wide import under the constitution and laws of the United States.

The Ninth Circuit decision does not fit into the category of cases contemplated under Rule 10, Supreme Court Rules. First, the particular issues involved are not questions of "wide import under the Constitution, laws, and treaties of the United States." Furthermore, they do not "present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." This petition provides this Court the opportunity to interpret a federal statute which has direct relevance for only Hawai'i under the unique scheme for public land management established by Congress for the State of Hawai'i.

1. The Evolution Hawaii Public Land Laws Differed Markedly from Those of Other States.

The Hawaii Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4. [hereafter, "Hawaii Admission Act"] reflects the decision of Congress to treat Hawai'i entirely differently in matters of public land management than any other state in the Union. The hallmark of this approach is the so-called "ceded lands" trust, created under § 5(f) of the Hawaii Admission Act. 76 Stat. 4.

The ceded lands trust was the historical continuation of a public land trust that was initially imposed during the period of the Hawaiian Kingdom and continued through Hawai'i's annexation to the United States in 1898. The uniqueness of § 5(f) of the Admission Act, can be best appreciated in the context of the origins of public lands in Hawaii, the pattern of the trust duty over these lands, and the historical evolution of the special trust

established by § 5(f).

Prior to Western contract, Hawaiians had no concept similar to fee simple ownership. Rather, the land was held in trust for the gods, administered by a chief, and the use rights of each segment of the Hawaiian population were recognized.[1]

In the Mahele of 1848,[2] King Kamehameha III began the process of creating individual land ownership. He set aside approximately 1.5 million acres of Government lands "to the chiefs and people of my kingdom.[3] At the same time, Kamehameha III set apart for himself almost a million acres of lands for his own use, which came to be known as the Crown lands. Until 1864, these lands, originally referred to as the King's lands, were considered private property by a succession of Hawaiian monarchs.[4]

Following the overthrow of the Hawaiian Monarchy in 1893, the Crown Lands were effectively merged with the existing Government lands. Liliuokalani v. U.S., 45 Ct.Cl. 418 (1910). Subsequently, the Republic of Hawaii ceded the approximately 1.75 million acres of former Government and Crown lands to the United States by

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[1] R. Kuykendall, The Hawaiian Kingdom, pp. 227-68 (1938); L. Thurston, The Fundamental Laws of Hawaii, at 3 (1904).

[2] The Mahele (meaning division) of 1848 was the division of lands between the King and chiefs and is generally viewed as the initial step to instituting fee simple ownership in Hawaii. See, J. Chinen, The Great Mahele: Hawaii's Land Division of 1848 (1958); A. Lind, An Island Community, pp. 24-39 (1938).

[3] See, Estate of His Majesty Kamehameha IV, 2 Haw. 715, 722-723 (1864), for the English translation of documents effectuating the division of lands between the King and government.

[4] As a result of an 1864 decision by Hawaii Supreme Court and the Act of January 3, 1865, King's Lands became inalienable and known as the Crown lands to indicate that they belonged to the king as sovereign and not as an individual. Id.

consenting to the Joint Resolution of Annexation of July 7, 1898.[5] [hereafter, "Joint Resolution"]. The opening paragraph of the Joint Resolution ceded and transferred to the United States "the absolute fee and ownership of all public, Government, or Crown Lands . . . belonging to the Government of the Hawaiian islands, together with every right and appurtenance thereunto appertaining . . ." The succeeding paragraphs vested all property and rights in the U.S., terminated treaties with foreign nations, and provided that the land laws of the U.S. should not apply to Hawaii.[6] 30 Stat. 750-52. Instead, the Joint Resolution further provided that Congress would enact special laws for the management and disposition of these ceded lands.

The third paragraph of the Joint Resolution placed a special trust on ceded lands and their revenues. Acknowledging that Hawaii had a well-established land tenure system and that the United States was receiving all the public lands free, Congress recognized that the use of public lands should continue to inure to the benefit of Hawaii's inhabitants. Thus, while the United States would hold the naked legal title to the lands, the beneficial uses were severed and allowed to remain with Hawaii's people.[7] This

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[5] J. Hobbs, "Hawaii: A Pageant of the Soil 118" (1953), 30 Stat. 750;

[6] As a result, unlike other states, Hawai'i never became part of the federal public domain except for its national parks, public buildings, and minor reservations. Comment, "Hawaii's Ceded Lands", 3 U. Haw. L. Rev., 101, 103 (1981).

[7] The U.S. had never allowed new states or territories to sever the beneficial uses and retain them for the indigenous population. In contrast, Texas, the only other state which like Hawaii had also been a sovereign nation, was allowed to retain full title to its public lands because it entered the Union as a state. See, "Hawaii Ceded Lands", Id. at 101, 110.

provision was unique in public land law, stating that ". . . all revenue from and proceeds from [ceded lands] . . .shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[8]

In 1959, by enacting § 5(f) of the Admission Act, the federal government continued to embody and elaborate upon earlier trust provisions involving public lands.[9] The Act substituted the state for the federal government as trustee of these lands. While the legislative history of § 5(f) fails to provide detailed guidance for the trust language, it is clear that Congress was concerned with the welfare of Native Hawaiians.[10]

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[8] "The terms upon which Hawaii was finally annexed reveal the unique place occupied by its ceded lands in Congress' public land acquisition and ownership scheme." Id. at 111.

[9] In 1900, Congress passed Hawaii's Organic Act, 31 Stat. 141 (1900), which provided specific laws for the management of ceded lands. Section 91 of the Organic Act provided that ceded lands should remain in the possession, use, and control of the territorial government. Section 73 stated that the proceeds from the sale, lease or other disposition of ceded lands should be held for "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation. . . ." (emphasis added)

In 1921, Congress again recognized the unique relationship between the federal government and Native Hawaiians, in 1921 by passing the Hawaiian Homes Commission Act [hereinafter, "HHCA"]. 42 Stat. 108 (1921). The Act withdrew approximately 188,000 acres of ceded lands and brought them under the jurisdiction of a Hawaiian Homes Commission, to be leased in homestead lots to Native Hawaiians at a nominal fee for 99 years.

A Native Hawaiian was defined in the Act as "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA, § 201(f).

[10] In enacting the Hawaiian Homes Commission Act, Congress was guided by several factors. First, there was a fear that Hawaiians were dying out as a race; their economic, social and physical conditions were dismal and their continued existence was at risk. Second, it was recognized that with the drastic economic and political changes brought by Western contact, Native Hawaiians had been displaced from Native lands and their rights in such lands had not been adequately protected. See, Congressional Record, May 21,

Under § 5(f), Congress transferred the fee title to most of the ceded lands, with some exceptions, to the new State of Hawaii. In its drastic departure from the typical practice of retaining title to its federal public lands, it also impressed upon the new state a duty to hold all lands and the proceeds therefrom [in part] "as a public trust for . . . the betterment of the conditions of native Hawaiians." (emphasis added). § 5(f), Hawaii Admission Act. In 1978, the state affirmed its commitment, specifying in a constitutional amendment its duty to manage this public trust "for Native Hawaiians and the general public." Haw. Const. Art. XII, Sec. 4. Pet. App. at 105a.

This history clearly demonstrates that Congress' approach to establishing the public land management system for Hawaii differed vastly from that taken for admitting other states, even from its closest cousins, Arizona and New Mexico.[11] In most instances, Congress typically made relatively smaller grants of common lands, vested with a public purpose (usually for the support of public schools), available to the new states, retaining title to most of the lands it acquired for the federal public domain.[12] Also, it never imposed a trust obligation on these new states to manage the lands it did transfer for a distinct class of native people, as it did for Hawaii. This trust relationship was so unique and special that the United States returned the title of the ceded lands to the

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1920, at 7448, 7451-7453. Undoubtedly, these same concerns prompted the inclusion of the § 5(f) trust purpose on the betterment of conditions of Native Hawaiians.

[11]Comment, supra, note 9 at 102

[12]Id. at 108-110.

new state--"an act without precedent in United States history and one wholly contrary to established congressional public policy."[13]

In essence, the dispute resolved by the Ninth Circuit involves the interpretation of prior Hawaii Supreme Court decisions and federal statutes -- the Joint Resolution and the Hawaii Admission Act. Napeahi v. Paty, 921 F.2d 897, 903 (9th Cir. 1991). Pet. App. at 4a. This interpretation of interrelated federal and state law established that lands which erode after annexation and become submerged is part of the federally-imposed ceded lands trust administered by the State of Hawaii. Id.; See, also State v. Zimring, 566 P.2d 725, 736, 58 Haw. 106 (Haw. 1971)[14]. Respondent is a beneficiary of that trust.

2. The Petitioner Exaggerates The Impact Of The Ninth Circuit Decision Far Beyond Its Real Scope.

Petitioner contends that:

> [The decision] portends the imposition of intrusive federal judicial oversight, at the behest of any private litigant with an interest in state land management, over literally millions of acres of trust lands in the Western States. The Ninth Circuit's novel decision cannot be logically limited to suits brought by native Hawaiians, or, indeed, suits involving only Hawaii's submerged lands, or even Hawaii's public trust lands. (emphasis added)

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[13]Id. at 102.

[14]In Zimring, the Hawaii Supreme Court held that a lava extension into the ocean created new public land that the state, rather than the private landowner along the coastline, owned in fee. The basis for the holding was the court's interpretation of the legal effect of the language in the Joint Resolution, which at annexation effectively conveyed any inchoate right of the Republic of Hawai'i to claim lava extensions that may form in the future to the United States. The U.S. subsequently conveyed that right and title to future lava extensions to the State of Hawai'i under § 5(b) of the Hawaii Admission Act. Id.

Pet. App. at 7-8. Moreover, Petitioner argues that the decision has widespread ramification for "numerous States, upon their admission to the Union have been granted lands for various trust purposes." Id. Petitioner goes so far as to predict that the decision, allowed to stand will have, "absent congressional intervention, wide-ranging, permanent effects upon the economic, social and political development of Hawaii and numerous other States." Finally, Petitioner warns that the Ninth Circuit decision will spawn "a host of suits challenging management of the Government's fiscal operations that may redound to the detriment of particular groups and individuals." Id. at 20.

In fact, no other state is subject to a similar obligation to a class of native beneficiaries. The statutes cited by Petitioner, except for Arizona and New Mexico, do not even impose any explicit trust responsibilities on them as a condition of statehood. Pet. App. at 13, fn. 2. Typically, the statutes cited by Petitioner involve land grants for a variety of public uses by the state, primarily for school construction.[15] Furthermore, none of the cited statutes, including the Arizona and New Mexico one, provide for the benefit of a group of native people in the administration of the public land laws enacted for these states, as does § 5(f).[16]

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[15] See §6(a), (f), and (j) of the Alaska Admission Act, 72 Stat. 339, 340-341 (1958); §§ 4-13 of the Idaho Admission Act 26 Stat. 215, 215-16 (1890); §§ 10-13 of the North Dakota-South Dakota-Montana-Washington Enabling Act, 25 Stat. 676, 679-80 (1889); §§ 7-10 of the Nevada Enabling Act, 13 Stat. 30, 32 (1864); and § 4 of the Oregon Admission Act, 11 Stat. 383 (1859).

[16] See, §§ 7, 8, 9, and 10 of the Arizona-New Mexico Enabling Act, 36 Stat. 557, 562-65 (1910);

Thus, as the ASARCO decision demonstrates, this Court will not allow standing, even where a public land trust is involved, when the plaintiffs are merely taxpayers or citizens with no injury "distinct" from other taxpayers or citizens. Id. at 613. In contrast, native Hawaiians have an interest distinct from other Hawaii taxpayers or citizens, being specifically recognized as specific beneficiaries of the ceded land trust for the betterment of their conditions. Hoohuli, 741 F.2d 1169, 1181 (9th Cir. 1984).

The effect of the Joint Resolution and the Hawai'i Admission Act § 5(f) is relevant only to Hawaii and its specific ceded land trust. The Ninth Circuit's decision and any subsequent lower court's final judgment will only resolve an issue material to the preserving the integrity of federally-sanctioned trust assets with no precedence in United States history. Accordingly, the ramifications of the Ninth Circuit decision is really limited to, and affects, only Hawaii's administration of, the federal ceded lands trust that is unique to this state alone. The impact of this decision on other states would be negligible. Since none of these jurisdictions have a distinct subcategory of beneficiaries who are native people, the standing afforded to native Hawaiians to enforce § 5(f) is unique to Hawai'i.[17] Therefore, the Ninth Circuit

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[17] The Ninth Circuit in fact distinguished the Congressional land trust established in the Arizona-New Mexico Enabling Act, 36 Stat. 557 (1910), in rejecting an attempt to impose "certain methods of holding, managing and accounting for the ceded lands and income" on the State of Hawaii. Price v. State of Hawaii, 921 F.2d 950 (9th Cir. 1990). Citing Lassen v. Arizona, 385 U.S. 458, 465-70, 470-74 (1967), it found that the Arizona statute prescribed land management methods "in exquisite detail" which required that state to follow "those detailed provisions . . . for the most part." On the other hand, it found that § 5(f) conferred "considerably broader" authority on Hawaii, and refused to require specific methods for administering this trust. Price 921 F.2d at

decision presents no question of wide import under the Constitution, laws, and treaties of the United States.

B. The Ninth Circuit's Allowance of Beneficiary Standing is Consistent with this Court's Precedents.

Under Rule 10.1(a) and (c), Supreme Court Rules, one possible basis for allowing review on a writ of certiorari would be that a United States court of appeals has decided a federal question in a way that conflicts with applicable decisions of this court. Again, despite the alleged significance of this error, Petitioner failed to object ot Mr. Napeahi's standing in the Ninth Circuit, acceding to full briefing on the merits. This court should deny certiorari given the need for well-developed facts to support standing. See, Hoohuli v. Ariyoshi, 741 F.2d at 1180-81. Mr. Napeahi nevertheless addresses this issue should this court consider it.

Petitioner now initially suggests that the Ninth Circuit has overstepped its role by relying on "discredited" notions of the court's power under Article III of the U.S. Constitution. Alternatively, he suggests that the issues " ... at least raise substantial issues regarding "the proper - and properly limited - role of the courts in a democratic society." Pet. App. at 17-18, citing Warth v. Seldin, 422 U.S. 490, 498 (1975).

Petitioner argues that Mr. Napeahi does not have standing to bring this action because he lacks a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." citing, Allen v. Wright, 468 U.S. 737, 751 (1984). Pet App. at 18. Relying on the plurality

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955.

opinion in ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989), (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.), Petitioner specifically argues that a native Hawaiian litigant has no standing to challenge state actions involving the ceded lands trust, since the effectiveness of its remedy for any injury will depend on "... the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." Id. at 614-15.

This proposition is based on the notion that " no Hawaii citizen has any claim to a particular constellation of benefits from the 5(f) corpus." (emphasis in original). Id.:

> Even native Hawaiians, who are the special beneficiaries of trust funds created under State law and administered by the Office of Hawaiian Affairs, see Haw. Rev. Stat. § 10-13.5 (Supp. 1990), [fn4] have no particular entitlement to 5(f) funds, as the Office of Hawaiian Affairs, like any legislative body, enjoys the discretion rationally to pick and choose from among those native Hawaiian trust beneficiaries most in need of aid. (emphasis added). Id.

Accordingly, Petitioner argues the issues are not appropriate for judicial review under prior rulings of this court since they do not conform to the case or controversy requirements of Article III. Pet. for Cert. at 20.

Petitioner both misstates the applicable law and misinterprets the applicable issue before this Court. The Ninth Circuit has several times correctly held that a native Hawaiian beneficiary of a public charitable trust, like the ceded lands trust, has the requisite standing to sue to enforce the trust and tc compel adherence to its terms. Price v. State of Hawaii, 1991 WL 122418,

*2 (9th Cir. Haw.)[July 11, 1991]; Ulaleo v. Paty, 902 F.2d 1395, 1397 (9th Cir. 1990); Price v. Akaka, 928 F.2d 824, 8826-27, superceding, 915 F.2d 469, 47 (9th Cir. 1990) [hereinafter, "Akaka"]; Price v. Hawaii, 764 F.2d 623, 630 (9th Cir., 1985) cert. denied, 474 U.S. 1055 (1986); [hereinafter, "Price I"]; Restatement 2nd of the Law of Trusts, §§ 214(1), 391.

Any breach of this trust is an injury to native Hawaiians which is "distinct" from the general citizenry, since a specific allocation of funds to a native Hawaiian is affected. Compare, ASARCO, and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). In addition, one like Mr. Napeahi can suffer a specific loss of access to, and the actual use of, important natural resource areas on submerged lands. Pet. App. at 95a.

Petitioner's misunderstanding of the issue and the law negates his contention that the Ninth Circuit decision below is at odds with the standing requirements articulated in ASARCO, Allen, Simon v. East Kentucky Welfare Rights Org., 426 U.S. 26 (1976), and Whitmore v. Arkansas, 110 S.Ct. 1717, 1725 (1990). If anything, Mr. Napeahi's standing is stronger than the plaintiffs who were found to have standing in Akaka.

First, Mr. Napeahi can show injury fairly traceable to Petitioner's conduct. Mr. Napeahi is a full-blooded Hawaiian beneficiary of the § 5(f) ceded land trust. Haw. Admission Act § 5(f); Haw. Const. Article XII, Sec. 4. See, Second Amended Complaint, Pet. App. at 95a. His injury, the improper diversion of the trust assets, and the resulting loss of 20% of the revenue foregone by that diversion, is directly traceable to Petitioner's

surrender of the 1.75 acres to a private hotel developer.[18] Id. at 95a-97a. Accordingly, the petitioner's basis for the argument that "no Hawaii citizen has any claim to a particular constellation of benefits from the 5(f) corpus" is simply not true in the case of native Hawaiians.

Even if there might be some dispute over how much is actually due because of differences in calculating revenues, the core requirement of this statute is clear. The key is that native Hawaiians are specifically entitled to 20% of ceded lands revenue, but have actually suffered a diversion of that amount "fairly traceable" to and "as a result of" the illegal surrender of ceded land. See, Arlington Heights, 429 U.S. 252; Allen, 468 U.S. at 751; Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). This connection is distinguishable from the more tenuous connection between the injury to indigent patients and the challenged IRS ruling that permitted some hospitals to refuse them admission. Compare, Hoohuli, 741 F.2d at 1180-81, and Simon, 426 U.S. 26.

Mr. Napeahi also specifically alleged he used the disputed submerged land area to gather foods and to enjoy the natural and aesthetic resources of the area. Pet. App. at 95a. The injury he suffered from the loss of use of the area is the type of noneconomic injury this Court has already readily acknowledged as the type sufficient to confer standing. Duke Power Co. v. Environmental Study Group, 438 U.S. 59 (1978).

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[18]Haw. Const. Art. XII, Sec. 4 establishes a public land trust for the benefit of native Hawaiians like Mr. Napeahi, and the general public. Pet. App. at 105a. Haw. Rev. Stat. § 10-13.5 specifically mandates that 20% of the revenues from the ceded land trust must be allocated to OHA to benefit native Hawaiians. Pet. App. at 116a.

Secondly, the requested relief would redress that injury by adjudicating the rights involved and compelling Petitioner to take affirmative future action to protect the trust res. Mr. Napeahi has sought appropriate declaratory relief and an order compelling Petitioner to conduct further proceedings to determine the lost value of the lands obtained by the State, and to refrain from future surrenders of submerged land without adequate procedural protections.[19] Pet. App. at 99a.

In contrast, Petitioner claims there can be no redress because of: 1) the lack of "'judicially discoverable and manageable standards' for determining the revenues to which OHA is entitled", 2) his freedom to make decisions which may not maximize income to the trust, 3) the "legislative choices" he alleges still need to be made to determine the type and amount of revenues subject to the 20% requirement, or 4) contingent events in the judicial system. Pet. App. at 9, 19 (n. 4), 20-21. Specifically, Petitioner claims there can be no redress because Mr. Napeahi cannot claim an entitlement to any specific monetary sum due to the discretionary power of OHA to allocate funds <u>after</u> it has gotten its 20% share. OHA's discretion to withhold government benefits from "certain native Hawaiians" is immaterial to whether the Court can declare a breach of trust as a result of a diversion of trust assets. <u>Id</u>. at 20, n.4.

However, the instant action is directed at an earlier point in

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[19]Since the complaint was filed, the Petitioner's Department promulgated new rules to require notice of pending shoreline certifications and to afford an opportunity for those aggrieved to request contested case hearings on those decisions. Hawaii Administrative Regulations, Title 13, Chapter 222. However, the adequacy of these rules has not been tested.

the legislative scheme of providing a trust fund for native Hawaiians before any discretionary finding decisions are made by OHA. It focuses on the failure to guard against improper diversion of trust assets. Petitioner has a nondiscretionary duty initially to (1) protect the trust res, then to turn over 20% of all revenue from ceded land dispositions, of whatever amount, to a native Hawaiian trust and (2) prevent future harm to important natural resource areas held by the state and utilized by native Hawaiians.

This distinction is central to what conduct of the state the Ninth Circuit will and will not scrutinize. In Price v. State of Hawaii, 921 F.2d 950 (9th Cir. 1990) [hereinafter, "Price II"] the Ninth Circuit held that it would not attempt to "micromanage" the state's administration of the ceded land trust, once it has received the revenues. Id. at 956. In particular, it declined to inquire into what "methods of holding, managing, and accounting for the ceded lands and income" the state must follow.[20] Id. However, the Ninth Circuit qualified its decision:

> That does not mean that the State can do what it likes with the property and the income [from ceded land dispositions]. Rather, the federal courts must ultimately determine whether the property has been diverted from section 5(f) purposes. That would, however, have to be in the context of litigation brought by the United States under section 5(f) or in the context of private litigation under Section 42 U.S.C. § 1983 which focused on some particular diversion. (emphasis added).

921 F.2d at 956 (9th Cir. 1990).

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[20] This part of the ruling supports Petitioner's position, but again, it is not relevant to the central issue in the instant action. Pet. App. at 7.

Mr. Napeahi is focusing on a "particular diversion"[21] by the state that violates the § 5(f) trust. The District Court can redress that failure to protect the trust res from an uncompensated private taking by requiring future action by Petitioner to forestall future diversions and enjoining future harmful conduct. The instant case specifically seeks to redress the improper surrender of property for no compensation, which forecloses any revenue to native Hawaiians for these dispositions of trust land. It also seeks to redress the surrenders of important submerged lands upon which native Hawaiians like Mr. Napeahi continue to depend to gather and maintain traditional cultural practices, which help to better the condition of native Hawaiians. In contrast to Petitioner's characterizations, native Hawaiians like Mr. Napeahi have a "particular, direct, and concrete injury," See, ASARCO, 490 U.S. at 616, from such ultra vires surrenders of trust land that judicial intervention can remedy by equitable relief directed at the Petitioner's challenged conduct. See, Simon, 426 U.S. 26.

Petitioner also carries his confusion to the specification of the questions presented to this court:

> 1. Whether private individuals who are only potentially beneficiaries of specific benefit programs administered with the public trust lands conveyed to Hawaii by § 5 of its Admission Act, Pub. L. 86-3, 73 Stat. 4, and **whose benefits will depend on decisions by**

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[21] By improperly certifying the shoreline in the Waikoloa area of the island of Hawai'i, the state allowed the uncompensated diversion of 1.75 acres of submerged land from a federal trust to go to the benefit of a private hotel developer. The hotel is currently using the property for strictly private, commercial uses, which is inimical to the purposes for the § 5(f) trust. This is exactly the type of diversion the Ninth Circuit contemplated being actionable under Section 1983. Price II, 921 F.2d at 956.

state officials who have lawful discretion to deny all benefits to such persons, may nonetheless, despite the jurisdictional limits of Article III and the Eleventh Amendment, seek relief in the federal courts whose effect would be only to increase the level of assets in the public land trust? (emphasis added).

2. Whether, § 5(f) of the Hawaii Admission Act, which requires that lands subject thereto be used for "one or more" of five purposes "in such manner as the constitution and laws" of Hawaii "may provide," and which authorizes a suit by the United States" as the stated remedy for the use of trust lands "for any other object," is enforceable by private citizen suits filed pursuant to 42 U.S.C. § 1983, and, if so, whether review in such suits includes not only whether the "one or more" clause has been generally complied with, but also **whether each and every state law bearing on the § 5(f) land trust has been obeyed**? (emphasis added).

Petitioner cannot ignore his fundamental duty to protect trust assets in part to better the conditions of native Hawaiians. By failing to establish precautions against such losses, he is continuing to deprive beneficiaries of both: (1) important submerged lands upon which they traditionally rely, or (2) their rightful 20% share of the value lost by improper dispositions, pursuant to state and federal law implementing that trust. Price II, 921 F.2d at 954-55; Akaka, 928 F.2d at 826-27. Conversely, the issue is not centered on the adequacy or level of benefits awarded by the Office of Hawaiian Affairs to its Native Hawaiian beneficiaries, or the management details of Petitioner's department, as Petitioner proposes. See, e.g., Price II, 921 F.2d at 955-56.

As such, Petitioner's characterization of the standing issue is misplaced. As a specific class of beneficiaries of the § 5(f) trust, native Hawaiians have standing to enforce a federal right as

a result of Petitioner's improper surrender of trust land. Akaka, 928 F.2d at 826-27. This right is distinct from that of the general citizenry. Id.; ASARCO, 490 U.S. at 613. The underlying claim in the instant action is just the type of diversion of trust assets the Ninth Circuit suggests is justiciable. Price II, 921 F.2d at 956. There is no inconsistency in what the Ninth Circuit is allowing and the notions of standing enunciated by this court, even in its plurality ASARCO, decision.

C. There are no particular "special and important" reasons under Rule 10.1(a), Supreme Court Rules, for granting review of the right to enforce state trust duties in federal court.

In addition, Petitioner attacks the purported attempt of a private citizen to question the State's discretionary "decision to prosecute 'when he himself is neither prosecuted nor threatened with prosecution.'" He claims that such legal challenges would also undermine "executive power to decline prosecution of civil claims". Pet. App. at 21, citing, Heckler v. Chaney, 470 U.S. 821 (1985).

This extension of the argument for discretion to pursue criminal prosecutions should have no bearing in the context of civil proceedings. Notwithstanding the Petitioner's mischaracterizations of the issues, there is no conflict between the Ninth Circuit's ruling and this court's previous pronouncements on Article III standing, prosecutorial discretion, federalism, or separation of powers.

Petitioner further claims the suit is in conflict with "Article III's concern for federalism and separation of powers principles," without elaboration. Pet. App. at 21, citing Allen.

Without more, this Court should ignore this argument as it adds nothing to the bare record before the Ninth Circuit on these issues.

Finally, the fact that there were six cases involving the ceded lands trust pending at the time of the Petition for Certiorari says nothing about whether it should be granted. Petitioner cannot support his claim that those cases threaten "disruption if not paralysis of the State of Hawaii's management of "its public lands". Pet. App. at 17. In fact, since the filing of the Petition, Petitioner has to concede that the state now has increased discretion to manage the public lands after prevailing on several cases.[22] Thus, if anything, there is a diminishing threat of disruption or paralysis on the State's management of the ceded lands.

II. THE ELEVENTH AMENDMENT IS NO BAR TO MR. NAPEAHI'S REQUESTED RELIEF.

This Court has considered an Eleventh Amendment defense even if raised for the first time on appeal. Ford Motor Company v. Treasury Department, 323 U.S. 459, 467 (1945). However, in a later case, it distinguished Ford Motor in determining that Iowa state attorneys had waived its sovereign immunity from suit under Iowa law by voluntarily appearing and defending the case on the merits,

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[22] The Ninth Circuit resolved Price II in the state's favor, allowing it broader discretion to manage the trust. In addition, the Office of Hawaiian Affairs prevailed in another state lawsuit, broadening its discretion to allocate ceded land trust revenues amongst its beneficiaries. Kepoo v. Burgess, No. 88-2987, (Haw. Sup. Ct. June 25, 1991). Finally, the Ninth Circuit recently affirmed the dismissal of a suit challenging the state's exchange of certain ceded land with a private landowner on the basis of the Eleventh Amendment. Ualelo v. Paty, 902 F.2d 1395 (9th Cir. 1990).

apparently abandoning its Eleventh Amendment defense raised in the initial answer to the complaint. Sosna v. Iowa, 419 U.S. 393, 396 n. 2 (1975).

Similarly, in Hawai'i, there is authority justifying a finding that Petitioner waived the State's Eleventh Amendment immunity by the state's voluntary appearance in the action and defense on the merits, in a case involving the education of handicapped children. Quote: The State waived immunity in this case by coming voluntarily into this Court in the face of the Congressional Grant of authority to provide all appropriate relief and by use of the appeal proceeding in this court when, under 20 U.S.C. § 1415, the state courts also had jurisdiction. Department of Education v. Katherine D., 531 F. Supp. 517, 529 (1982), aff'd in part, rev'd in part on other grounds, 727 F. 2d 809 (1982); cert. den. 471 U.S. 1117 (1984). The Hawaii Supreme Court also refused to consider upsetting the finality of a lower court judgment where a state agency only raised its sovereign immunity defense on appeal for the first time. Ahuna v. Department of Hawaiian Home Lands, 640 P.2d 1161, 64 Haw. 327, 333 n.9 (Haw. 1982),

In this instance, this Court should reject consideration of the Eleventh Amendment defense becauSE it was again raised for the first time in the petition. The lower courts never had a chance to visit this issue. By voluntarily appearing without challenge in the Ninth Circuit, Petitioner's counsel waived this defense. Petitioner nevertheless complains that the Ninth Circuit sua sponte failed to recognize that the Eleventh Amendment barred the action, despite his failure to call this issue to that court's attention. Pet. App. at 22. Where Petitioner has failed to raise any of the

issues raised in this petition before the Ninth Circuit, this court should decline to consider this particular immunity issue sua sponte out of practical concerns for judicial administration.

A. The Instant Action Is Not Ripe for Review By This Court Since the Lower Court Never Had the Opportunity to Fashion a Remedy That Would Not Be Barred Under the Eleventh Amendment.

In an analogous instance involving a pending determination of whether the State of Hawaii had deprived various landowners their due process rights involving water rights, the Court declined to participate under the standards of ripeness. Robinson v. Ariyoshi, 474 U.S. 1018 (1989), citing Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), 477 U.S. 902 (1986). In that case, this Court saw no reason to rule on the claim of an unconstitutional taking of a perceived property interest where the claimants could show no act by the state to deprive them of any water rights. Id.

Similarly, this Court should not attempt to prematurely second-guess the District Court for Hawaii. Petitioner should not be allowed to speculate on how that lower court would fashion appropriate relief. Instead, this Court should allow the Ninth Circuit to remand the case to the District Court, which should be allowed to determine the appropriate remedy in the first instance. In short, under the standards of ripeness, this Court should decline accepting the petition until the lower courts have had an opportunity to deal with the appropriateness of the remedy in this action in light of Williamson County and Sosna.

B. **In Any Case, The Ninth Circuit's Decision Is Consistent With This Court's Eleventh Amendment Decisions.**

Since this Court's decision in Hans v. Louisiana, 131 U.S. 1 (1890), state Defendants have been protected from suits by its own citizens in federal court. However, in Ex parte Young, 209 U.S. 123 (1908), this Court created an important exception to the general shield against such federal suits against state officials who have violated federal law. In Ex Parte Young, this Court upheld the lower court's injunction enjoining a state attorney general from a confiscatory railroad rate enforcing the schedule. The Court reasoned that a state official seeking to enforce an unconstitutional statute in the name of the state, "comes into conflict with the superior authority of that constitution, and he is in that case, stripped of his official or representative character." Id. at 159. In short, this doctrine makes possible the prosecution of claims by private parties in federal court for injunctive relief against state officials carrying out state policy, ultra vires, in violation of federal law. Id. at 157-60, See also, Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (plurality opinion). Commentators have concluded that

> [I]n perspective the doctrine of Ex Parte Young seems indispensable to the establishment of constitutional government and the rule of law.

34 DePaul L. Rev. 515, n. 86, citing C. Wright, Law of Federal Courts, 292 (4th Ed. 1983).

On the other hand, attempts to seek monetary damages in federal court against state officials have been disallowed under the Eleventh Amendment. Ford Motor Company v. Treasury Department,

323 U.S. at 464. Furthermore, even if the monetary relief sought is characterized as equitable restitution, the Eleventh Amendment acts as bar as well. Edelman v. Jordan, 415 U.S. 651, 664-668 (1974). The relief sought in Edelman was cast as an action for declaratory and injunctive relief against a state official who had allegedly violated federal law in administering a welfare program by not complying with federal time limits for processing applications and making grants. This Court affirmed the injunctive relief to prevent continuing harm, but reversed the order to release retroactive benefits "which requires the payment of funds from the state treasury." Id. at 677. Under this analysis, this Court focused on the issue of whether the retroactive benefits were either: 1) merely ancillary to the injunctive relief and therefore, permissible as "an inevitable consequence" of the Ex Parte Young principle; or 2) in essence, for the recovery of money from the state and therefore barred by Ford Motor Company Id.

Petitioner fashions the instant action as one which should be barred under the Eleventh Amendment, because the only remedy that would be appropriate in the action would amount to "a substitute for the return of the trust corpus itself." Pet. App. at 23, citing Papasan v. Allain, 478 U.S. 265, 281 (1986). Petitioner urges this Court to characterize the relief sought in this action as "a one-time restoration of the lost corpus itself," which would be "an impermissible award of 'an accrued monetary liability'." Pet. App. at 15, citing Papasan, 478 U.S. at 281.

In Papasan, various school officials and school children in twenty-three northern Mississippi counties filed suit against various state officials, claiming that they were being unlawfully

denied the economic benefits of public school land granted by the United States to the State of Mississippi. Plaintiffs sued for breach of trust and denial of equal protection to remedy a gross disparity in funding levels for students in different parts of the state, caused by an ill-fated decision to sell trust lands to a railroad that was destroyed in the Civil War. Plaintiff sought money or land compensation to overcome the disparity.

The Supreme Court held that the breach of trust claim was barred by the Eleventh Amendment, but the "equal protection" action was not. The Court reasoned that the Eleventh Amendment barred relief that it "in essence serves to compensate a party injured in the action by an action of a State official in his official capacity that was illegal under federal law." Id. at 278. In contrast, this Court allowed "relief that serves directly to bring an end to a present violation of federal law...even though accompanied by a substantial ancillary effect on the state treasury." Id. Applying this distinction, the Court reasoned:

> [The] alleged ongoing constitutional violation - unequal distribution by the capital estate of the benefits of the capital estate's school lands - is precisely the type of continuing violation for which a remedy may permissibly be fashioned under Young. ... A remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure "compliance in the future with a substantive federal-question determination" rather then bestow an award for accrued monetary liability. Id. at 282.

The fact that the Papasan case involved a claim for breach of trust does not automatically preclude any remedy involving such claims under the Eleventh Amendment. Pet. App. at 22 citing Papasan 478 U.S. 265. The distinguishing feature of the instant case is that the relief sought is not designed to order a payment

from the state treasury. See, Ford Motor Co., 323 U.S. at 464. Specifically, Mr. Napeahi is asking the lower court to order Petitioner to conduct further proceedings to determine the reasonable value of the submerged land abandoned ultra vires by Petitioner to the private land owner so he can later demand appropriate compensation.

Furthermore, the trial court could, and should, also be allowed the first change to fashion other appropriate relief, after considerations of the circumstances based on the outcome of the trial. It may conclude that Petitioner, having acted ultra vires, may also be found in violation of state law under Treasure Salvors. See, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 116 n.11, n.25 (1984); Pet. App. at 99a. Accordingly, this Court should deny this petition as premature and allow a record to be built on this question.

Mr. Napeahi also asks for an injunction to prevent Petitioner from further recertification of shorelines in the State of Hawaii, which result in the abandonment of ceded lands to private interests without public hearing or notice, compensation, or explanation. Id.

Thus, the lower court can and should be allowed to enjoin Petitioner from acting in a way that constitutes a "continuing violation" of federal law the continuing loss of trust land for no compensation. Papasan, 478 U.S. at 282. The ancillary effect on the state treasury is at most minimal, rather than "substantial." Papasan, 478 U.S. at 278. The requested relief to compel future actions by the state is the same type of relief that would "directly bring an end to a present violation of federal law." Papasan, 478 U.S. at 278. Thus, neither of these forms of relief

fit in the category of those barred by the Eleventh Amendment under Papasan or Edelman.

The trial court could, and should, also fashion other appropriate relief, depending on the outcome of the trial, under the Ninth Circuit's ruling. Mr. Napeahi is attempting to enforce a trust for which the State of Hawaii accepted responsibility as a condition of statehood. See, Haw. Const., Article XII, 4. Inextricably tied to this responsibility is a federal law which set the parameters for this unique trust obligation -- the Joint Resolution and the Hawaii Admission Act § 5(f). Accordingly, this Court should deny this petition as premature.

C. The Litigation As To The State's Title Is Not Barred Simply By Calling It A Quiet Title Action Against The State in Federal Court.

Litigation as to the State's title, even if more land is sought for the state's land inventory, is not "independently infected by Eleventh Amendment error" simply because it is called a quiet title action against the state in federal court. Pet. App. at 22, citing Treasure Salvors, 458 U.S. at 700. The Petitioner's rationale is that nothing in the Eleventh Amendment permits the federal courts to serve as "fora for quiet title actions against the respective States," especially "when the operative issues turn on novel theories of state law." Pet. App. at 23, citing Pennhurst, 465 at 119-20.

As previously discussed, the instant case partially involves the adjudication of federal law. The effect of the Joint Resolution and the Hawaii Admission Act are indispensable to the Court's analysis. In this sense, the Treasure Salvors decision is

clearly distinguishable, although the lower court could also invoke pendent jurisdiction under this case for ultra vires acts. Similarly, because federal law is involved, Petition cannot rely on Pennhurst, which is based on the interpretation of state law only. Accordingly, this suit is not "federal interference in the State's management of their (sic) own affairs." Pet. App. at 7.

III. PETITIONER WAIVED HIS OBJECTION TO THE AVAILABILITY OF (1) A RIGHT OF ACTION UNDER § 1983 AND (2) ABSTENTION, BY FAILING TO RAISE THE ISSUES ON APPEAL BEFORE THE NINTH CIRCUIT.

In the absence of extraordinary circumstances, this Court will not decide an issue which was not presented to the lower appellate court. Delta Airlines v. August, 450 U.S. 346, 362 (1981); Adickes v. S.H. Kress and Co., 398 U.S. 144, 147 n.2 1970). This rule will only be disregarded in exceptional cases. Stone v. Powell, 428 U.S. 465 n.15 (1976). Normally, this Court may consider jurisdictional issues, even sua sponte, whether or not raised below. United States v. Storer Broadcasting Co., 351 U.S. 193, 197 (1956). Accordingly, Mr. Napeahi has responded to Petitioner's arguments relating to standing and the Eleventh Amendment sovereign immunity defenses. Nevertheless, Petitioner's failure to raise any of the issues in his petition below raises serious questions about propriety of resolving those issues before the lower court has considered them.

Furthermore, this Court will not decide a case on grounds in other instances of "plain error", unless that error "seriously affects the fairness, integrity, or public reputation of public proceedings". United States v. Atkinson, 297 U.S. 157, 160 (1936), quoted in Connor v. Finch, 431 U.S. 407, 421 n.19 (1977), See, Wood

v. Georgia, 450 U.S. 261, 265 n.5 (1981).

The question of whether § 5(f) creates enforceable rights under § 1983 is not the type of issue that affects the integrity of public proceedings, where the state has failed to raise it below. Thus, this court has refused to consider the late submission of whether a right of action under 42 U.S.C. § 1983 is barred where it was never first raised in the lower appellate court. See, Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 278-279 (1977); Cf., cited in, Ahuna, 640 P.2d 1161, 64 Haw. at 333.

Similarly, whether the federal district court should abstain from adjudicating an action is not considered a subject matter which this Court will consider when a state has voluntarily appeared below without objection:[23]

> Younger and these cases [omitted] express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "get its own house in order" when the federal issue is already before a state tribunal.
>
> It may not be argued, however that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. (emphasis added).

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[23]Nevertheless, in spite of Petitioner's legal points, Petitioner's abstention argument must fail. That argument rests on false premises.

First, the "central question" of whether the rationale of State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) regarding the state's inchoate property rights applied to eroded submerged lands is not one of purely state law. Pet. App. at 29. As earlier noted, Zimring, involved the interpretation of federal law in its analysis.

Secondly, abstention under Burford v. Sun Oil, 319 U.S. 315 (1943) is not applicable. Petitioner bases this argument on the unfounded perception that the District Court would interfere with "Hawaii's shoreline certification process...[which]...was fully in play." Pet. App. at 29. However, it is clear that there was no shoreline certification process in effect at the time, since no rules on shoreline certification went in effect until December 10, 1988. Administrative Rules, Title 13, Chapter 222. Again the sufficiency of these rules has not been tested. Supra, note 19.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479-80 (1977), cited with approval in Swisher v. Brady, 438 U.S. 204, 213 (1977).

Therefore, these issues cannot be raised for the first time on appeal to this Court as Petitioner never raised these issues before the Ninth Circuit and has waived them.[24]

IV. THE FEDERAL COURTS HAVE FEDERAL QUESTION JURISDICTION OVER THE CLAIMS RAISED IN THIS ACTION.

The Ninth Circuit has logically and repeatedly held that federal question jurisdiction exists to entertain suits alleging violation of § 5(f) through 42 U.S.C. § 1983. Akaka, 928 F.2d at 827-28; Price II, 921 F.2d at 954-55; Price v. State, 764 F.2d at 628, citing with approval, Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467, 1472 (9th Cir., 1984).

This state statutory and constitutional entitlement for the benefit of native Hawaiians is "rooted in federal law." Hawaii Admission Act, § 5(f), Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990), citing with approval, Keaukaha II, 739 F.2d at 1472. There is no reason for this Court to question these holdings, which are well-founded in federal jurisdiction even though Petitioner persistently, albeit unsuccessfully, attempts to do so.[25] In this

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[24] Accordingly, this Court should not hold the petition pending its decision in Suter v. Artist M., No. 90-1488 (U.S. Cert. granted May 3, 1991).

[25] The Ninth Circuit has expressed its consternation over the state's persistent refusal to accept its specific holdings on this issue:

> [W]e have been subjected to arguments by [state] appellees in this case...on issues which, themselves, have previously been settled by us. See, for example, Part A of this Opinion regarding standing. Appellees have even suggested that there is no section 1983 action

instance, Petitioner attempts to invoke a jurisdictional bar to this action by questioning whether "quiet title" actions present a federal question. This Court might address this issue as it may sua sponte. Storer Broadcasting, 351 U.S. at 197. Pet. App. at 24. He again raises the specter of the perceived broad impact of such actions, arguing against federal jurisdiction over suits "involving the rights to land acquired under a law of the United States." He contends that if such suits "'arise under "federal law... [then] every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws.'" Id., citing Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912).

First of all, the instant case is no typical quiet title case. It requires the interpretation of federal law to resolve this issue. Secondly, given the unique design and history of the ceded lands trust, it is especially difficult to cite to instances when the determinations like that of the Ninth Circuit's would have any impact outside of the District of Hawai'i.

The dated Shulthis case cited by Petitioner involved a private dispute between private parties over the rights to drill for oil and natural gas on lands allotted to a member of the Creek Nation.

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially

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available regarding failure to follow section 5(f) of the Act. Again, the contrary has long since been settled by us. See Price II, 921 F.2d at 956; Akaka, 928 F.2d at 827-28; Ulaleo, 902 F.2d at 1397; Keaukaha II, 739 F.2d at 1470-71; 1991 WL 122418, *6 (9th Cir.(Hawaii)).

> involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving the rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. [citations omitted]. Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912). (emphasis added).

The plaintiff-appellants' counsel cited various federal laws relating to the allotment in severalty of the lands of the Creek Nation, under which the suit supposedly arose. However, this Court restricted its consideration of jurisdiction based on the wording of the complaint alone, and found that it was not necessarily true that those statutes constituted the source of the complainant's claim. Id. at 570.

Clearly, Petitioner has cited Shultis out of context. That case merely established that federal jurisdiction does not always exist simply where title to land originates in a federal statute. However, jurisdiction can exist for a suit arising under the laws of the United States where the suit "substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Id.

In the instant case, the outcome of the Ninth Circuit's decision is based on its interpretation of both state and federal law (the Joint Resolution and the Admission Act). See, Pet. App. at 12a - 13a; See also, State v. Zimring, 566 P.2d 725, 735-36 (Haw. 1977). Contrary to Petitioner's characterization, the Ninth Circuit did not decide on the basis of only "state law doctrines of accreted rights to submerged lands." Pet. App. at 13, See, supra.

Accordingly, the decision was not dependent solely on "novel theories of state law." Pet. App. at 23, citing Pennhurst, supra.

In contrast to Shultis, the instant Ninth Circuit decision also involved the depletion of assets from a federally created trust, contrary to the federal and state law. It is of no import that the Ninth Circuit partially relied on state law in its preliminary ruling that submerged lands, which may have eroded since the Republic of Hawai'i's formal cession of lands to the United States in 1898, are considered ceded lands. That holding "substantially involves a dispute or controversy that was resolved by a determination of the construction or effect of" the Joint Resolution as it affected the lands ceded to the United States and returned to the state under § 5(f). Shultis, 225 U.S. at 570.

Therefore, the instant case presents no conflict with Shultis. Furthermore, since federal law is inextricably related to the result of the Ninth Circuit decision, there is federal question jurisdiction in this instance pursuant to 28 U.S.C. § 1331.

CONCLUSION

The failure to raise any of the issues on appeal below is inconsistent with the importance Petitioner currently attributes to them. Therefore, this Court should deny the petition either because Petitioner failed to raise significant issues below or misread the law as it applies to this action. This Court should allow the lower courts to initially adjudicate the issues, build a more complete record and fashion appropriate relief in accordance with this Court's prior decisions.

Supreme Court, U.S.
FILED
SEP 20 1991
OFFICE OF THE CLERK

No. 90-1937

In The

Supreme Court of the United States

October Term, 1991

WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

Petitioner,

vs.

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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No. 90-1937

In The

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WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

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MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

SUMMARY OF ARGUMENT

Respondent's opposition demonstrates more clearly than ever that the Ninth Circuit's unprecedented intrusion into Hawaii's management of its trust lands should not be permitted to stand.

ARGUMENT

A. Certiorari Should Be Granted to Review the Jurisdictional Underpinnings of the Ninth Circuit's Expansive Invitation to Equity Suits Seeking to Manage Hawaii's Public Trust Lands.

Respondent reluctantly agrees Petitioner's Article III and Eleventh Amendment challenges to the judgment below are

before the Court, *see* Resp. Br. at 29[1], but nonetheless claims these issues are not worthy of this Court's review. Thus, Respondent urges, as to Article III, that review should be denied because "Mr. Napeahi can show injury fairly traceable to Petitioner's conduct" (Resp. Br. 14), and "there is no conflict between the Ninth Circuit's ruling and this court's previous pronouncements on Article III standing, prosecutorial discretion, federalism, or separation of powers" (*id.* at 20). As to the Eleventh Amendment, Respondent claims (a) the issue is premature (*id.* at 23, 27); and (b) meritless because the relief sought does adjudicate the State's title (*id.* at 28), or State law (*id.* at 28-29), or constitute a "one time restoration" (*id.* at 24-28). None of these arguments provide a basis for denying review.

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[1] Respondent argues, inconsistently, that the Eleventh Amendment argument comes both too soon and too late. Neither is true. As to the latter, see *Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978); indeed, the Eleventh Amendment was both pled and moved upon, even in the trial court (*see* Pet. App. 22a). Petitioner's failure to raise the Eleventh Amendment defense at the court of appeals stage is not a bar here. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *id.* at 165 & n.49 (Stevens, J., dissenting). Nor is there a full appellate forfeiture, in *this* Court, of sovereign immunity, as the issue is squarely raised in the Petition. *See Sosna v. Iowa*, 419 U.S. 393, 396 n.3 (1975). Finally, although "a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts," *Pennhurst II*, *supra*, 465 U.S. at 99 n.9, and hence it is of no relevance what may constitute a waiver of immunity in *state* court, Respondent is wrong (Resp. Br. 22) in asserting that in Hawaii immunity may not be raised for the first time on a direct appeal. *Compare Figueroa v. State*, 61 Haw. 369, 381, 604 P.2d 1198, 1205 (1979) (sovereign immunity "may be raised at any time"), *with Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 333 n.9, 640 P.2d 1161, 1165 (1982) (immunity cannot be raised in a collateral attack when the time to appeal has expired (citing rulings of this Court in support)).

1. The Ninth Circuit's Allowance of Standing Here is Plainly at Odds With This Court's Precedents, and at the Very Least Presents Issues Meriting this Court's Review.

Respondent claims that standing exists because "a specific allocation of funds to a native Hawaiian is affected" and, allegedly, due to the actions of the Director of Land and Natural Resources, "one like Mr. Napeahi can suffer a specific loss of access to, and the actual use of, important natural resource areas on submerged lands" (Resp. Br. at 14).

These claims, however, are not only factually untrue, but are legally untenable. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984), *quoted*, Pet. at 18. Respondent is at least quadruply wrong in claiming that Article III standing exists.

First, while Respondent claims that twenty per cent of the *revenues* from Hawaii's public trust land, as defined by Ch. 304, 1990 Haw. Sess. L. 947 *et seq.* (Pet. App. 118-31), are to be channeled to the Office of Hawaiian Affairs, there is nothing which legally requires that there *be* revenues from the trust lands. There can be no claim that native Hawaiians, even via the Office of Hawaiian Affairs, *see id.*, have any claim to funds from public trust lands that are wrongly diverted to private hands. Such lands, even if recovered, need not be made profitable, or, even, revenue generating at all. Thus, even if the District Court were to declare the shoreline certification in this case unlawful, and enjoin its "recovery," that relief would not likely redress *any* monetary injury Plaintiffs suffer.

Second, even if the "recovery" of the lands would redound to the benefit of the Office of Hawaiian Affairs, that would plainly *not* give rise to any Article III "controversy." OHA, like any legislative entity, is free rationally to choose which projects benefitting its constituents, *i.e.*, in the case of projects funded with 5(f) revenues, "native Hawaiians," to fund. *See* Pet. App. 126 (H.R.S. § 10-13.5 (1990) (5(f) money "shall be expended by the office for the betterment of the conditions of native Hawaiians" generally, leaving to OHA's discretion which projects to fund). OHA has no duty whatever

to fund any project benefitting Mr. Napeahi. Neither Respondent nor the Ninth Circuit below have any good answer to this.

Indeed, it is for this precise reason that this Petition squarely presents the jurisdictional obstacle identified by the four-Justice opinion in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), and why, in light of the general standing precepts stated in *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), the judgment below is plainly wrong. There is literally no difference, for Article III purposes, between this case and one in which, say, a private citizen sues to enjoin the Internal Revenue Service's failure to collect all the revenue that is due on the ground that that person is "injured" by the Government's lack of resources to spend on social welfare (or other) programs the federal plaintiff desires. Such suits requiring the federal Courts' speculation as to legislative choice have never been permitted. Accordingly, certiorari should issue.

Third, even if this Court were to tolerate speculative predictions of future legislative action as a basis for entertaining injunctive suits, that would not overcome the independent interference with prosecutorial discretion entailed by the judgment below. *See* Pet. at 21. The claim that "the issue is not centered on the adequacy or level of benefits awarded by the Office of Hawaiian Affairs to its Native Hawaiian beneficiaries, or the management details of Petitioner's department" (Resp. Br. at 19) only highlights that this suit seeks an impermissible federal directive to state officials to prosecute. *See* Resp. Br. at 27 (relief sought is money from the Waikoloa Beach Resort, gained through prosecutive demands by Petitioner).

Fourth, Respondent's claim is premised upon even further speculation as to whether any relief would be forthcoming from the state *courts* in a suit against the resort. *Compare Whitmore v. Arkansas*, 110 S. Ct. 1717, 1725 (1990). Under Hawaii law, for example, the Waikoloa would have colorable claims of estoppel against any effort to recover the beachfront which the hotel's owners and predecessors in interest spent large sums to develop. *See, e.g., Robinson v. Ariyoshi*, 65

Haw. 641, 667, 658 P.2d 287, 305 (1982) (quoting *Filipo v. Chang*, 62 Haw. 626, 628 P.2d 295 (1980)). Standing cannot exist in this case without a usurpation, therefore, of critical functions not only of the legislature and executive but also the state judiciary.[2]

There is plainly no Article III controversy here, and the Court should grant the petition for certiorari and so hold.

2. The Ninth Circuit's Remand Clearly Conflicts With This Court's Elaboration of Eleventh Amendment Constraints.

There is no merit to Respondent's effort to evade review of the severe Eleventh Amendment defects in the judgment below.

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[2] While Respondent seeks to avoid this analysis by claiming that the lands in issue are "submerged lands upon which native Hawaiians like Mr. Napeahi continue to depend" (Resp. Br. at 18), this is not the basis of the judgment below, and it is not clear that Respondent ever perfected this basis for standing in the lower courts. Accordingly, the Court should not consider this basis for jurisdiction. *See Bender v. Williamsport Area School District*, 475 U.S. 734, 741-43 (1985); *cf. Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986). In any case, this alternative claim does not overcome the argument stated in the Petition, for the same reasons stated above. Indeed, the State could build its own limited access beach that would inflict the same injury suffered now, even if the Attorney General could be compelled to sue, and the Waikoloa could be compelled to give back the beach. Moreover, Respondent does not even claim that he wishes the beach restored to the State. *See* Resp. Br. at 27. Finally, there is nothing in the record to show that Mr. Napeahi's interest in the land at issue is any different than any other person in Hawaii (or the nation, for that matter), who wishes, even for the best of motives, to frustrate, the development of the coast of west Hawaii. *Compare Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990).

Respondent also argues that the Petition "exaggerates the impact" of the decision below (Resp. Br. at 9-11), but this asserted basis for denying review is belied, not only by the brief of the amici States, but also by Respondent's own argument confessing that with respect to its trust lands Hawaii has perhaps the broadest discretion of the States. *See* Resp. Br. 11 n.17, 17 (quoting *Price v. Hawaii*, 921 F.2d 950 (9th Cir. 1990)).

First, the issue is hardly premature, given the "special obligation" this Court has to assess the jurisdiction "of the lower courts in a cause under review." *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Moreover, even if it were appropriate in some cases to allow development of the record upon an Eleventh Amendment defense, such development is not needed here. *Cf. Papasan v. Allain*, 478 U.S. 265 (1986) (assessing "breach of trust" claim on a Rule 12 motion record).

Second, Respondent has no real answer to *Papasan*'s bar on "breach of trust" claims, as his effort to water down the relief sought demonstrates (*see* Resp. Br. at 27). Even if it is proper under Article III to ask the District Court to instruct the Director of Lands to pray for compensation from the Waikoloa, nothing in *Papasan* in any way limits the ban on relief amounting to "a substitute for the return of the trust corpus" in the way Respondent suggests. Respondent has here no more of a "continuing violation" than did the beneficiaries of the trust lands at issue in *Papasan* on their breach of trust claim. See 478 U.S. at 297-98 & n.3 (Powell, J.). The bar on retrospective relief does not permit the federal courts to render the States collection agents vis a vis past overpayments any more than it permits federal judicial decrees remedying past underpayments. *See Edelman v. Jordan*, 415 U.S. 651 (1974).[3]

Third, Respondent does not answer the independent claim that the litigation below constitutes an impermissible review of the State's claimed title (Pet. at 23). Even if the issue below is one of federal law, the bar of *Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 700 (1982), is not

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[3] Respondent contends he would at the very least be entitled to "an injunction to prevent Petitioner from further recertification of shorelines in the State of Hawaii which result in the abandonment of ceded lands to private interests without public hearing or notice, compensation, or explanation" (Resp. Br. at 27). Aside from the fact that such relief is nowhere contemplated in Section 5(f), or in any included state statute, such claims are independently barred at the least by the standing precepts of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

limited to cases where title is founded upon state law. Of course, since it is a State's prerogative to recognize private rights in public trust lands as it "see[s] fit," *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1984), this case is truly one where the bar on the litigation of state law qua state law, *see Pennhurst II, supra*, is fully in play.

Review should be granted on the Eleventh Amendment claims.

B. Certiorari Should Be Granted to Review the Court of Appeals' Expansive Reading of 42 U.S.C. § 1983.

Respondent offers virtually no reason at all to justify, as correct, the Ninth Circuit's determination that 42 U.S.C. § 1983 can be used to enforce Hawaii's Admission Act in this context. Respondents' sole argument on this front is that the issue is waived.

Respondent's concerns are misplaced for several reasons.

First, even Respondent must concede that this Court may review the judgment below for determination whether this case "arises under" federal law for purposes of subject matter jurisdiction. *See* Resp. Br. at 31-34. As the Petition demonstrates, both Respondent and the lower court have erred to the extent they assume that the issue of the Waikaloa's title is a question of *federal* law. For even if the submerged lands at issue here were at one time owned by the State, "States have the authority to define the limits of the lands held in public trust and to recognize rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988); *see also* Pet. at 23-24. Nothing in *State v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977), in any way refutes the contention that this suit does not arise under federal law. Indeed, *Zimring's* analysis of where lava flows "vest" belies any suggestion that the title question below turns on federal law. *See* 58 Haw. at 119-21, 566 P.2d at 734-35. Accordingly, review is proper.

Second, even if the Court must determine whether § 1983 properly was invoked below in order to reverse the judgment, that question is properly before the Court. Fairly read, the

Ninth Circuit's judgment in this case "passed upon" the issue of § 1983 enforceability, preserving the issue for review. Indeed, the Ninth Circuit's opinions in this area, both in this case, and generally, make clear that the Court treats "standing" to sue as encompassing the right to invoke § 1983. *See, e.g., Price v. Hawaii*, 939 F.2d 702, Slip Op. at 10667 (9th Cir. Aug. 8, 1991) (discussing under the heading of "standing" the holding that "an action under 42 U.S.C. § 1983 is proper" to enforce § 5(f)); *Price v. Akaka*, 928 F.824, 827 (9th Cir. 1991) (addressing availability of § 1983 under subject matter jurisdiction); *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990) (plaintiffs "have standing to bring suit" (citing *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981)). The panel here invoked this line of authority (*see* Pet. App. 7a & n.2), and the issue is here. *See Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991).

Third, the entire purpose of the "pressed or passed upon below" rule is to assure that the lower courts have the full opportunity to develop their view of an issue before that issue is brought here. In this case, as Respondent himself argues, any further litigation of the § 1983 question in the Ninth Circuit has been flatly foreclosed by *Price v. Hawaii*, 939 F.2d 702 (9th Cir. as amended August 8, 1991), *quoted at* Resp. Br. at 31-32 & n.25. No purpose would be served by denying review on this point. No fact issue is relevant. Indeed, the issue "goes to the validity of the . . . proceeding that is the basis for this litigation," *Freytag v. Commissioner*, 111 S. Ct. 2631, 2639 (1991), and presents a question "antecedent to [the merits] and ultimately dispositive of the present dispute," *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990). These factors cut strongly in favor of review. Indeed, other than conclusorily citing the Ninth Circuit cases of which review is sought, Respondent offers no defense of the lower courts' deployment of 42 U.S.C. § 1983 to enforce § 5(f). *Cf.* this Court's Rule 15.1.

For all these reasons certiorari should be granted, or at least the Court should hold the petition pending decision in *Suter v. Artist M.*, No. 90-1488 (cert. granted March 13, 1990).

C. Review Should Be Granted In Light of the Substantial Grounds for Abstention Below.

Respondent's argument that abstention has been waived and is improper in any event (Resp. Br. 30 & n.23), does not hold up. *See* Pet. at 29. This Court, as to *Pullman* abstention, *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), has made clear that it will not "defer to the wishes of the parties concerning adjudication," *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11 (1977). Likewise, the settled rule is that *Burford* abstention, as well, may be raised for the first time on appeal. *See Grimes v. Corwn Life Ins. Co.*, 857 F.2d 699, 706-07 (10th Cir. 1988). Moreover, abstention *was* raised in District Court. *See Ohio Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986). Respondent's claim that state law is not at the heart of this case is not only wrong, but an about-face from the position taken below. In the Ninth Circuit, Napeahi, indeed, moved for certification of questions to the Supreme Court of Hawaii. *See* Order, No. 87-1844 (9th Cir. Mar. 21, 1988). While Petitioner, then, did not believe the state law issues at all unclear, no party then disputed the potential applicability of certification under H.R.A.P. 13. Abstention is proper, and for this added reason, so is review here.[4]

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[4] Respondent's argument that *Burford* abstention is inapt because of the lack of administrative rules (Resp. Br. at 30 n.25) has no bearing on whether a proceeding under the Administrative Procedure Act, HRS Ch. 91, could have tested the claims here. There is no "ongoing proceeding" requirement for *Burford* abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315, 327-34 (1943).

CONCLUSION

For the reasons above, in the petition, and in the brief of the States of Alabama, Alaska, Idaho, Indiana, Missouri, Nevada, Oklahoma, Oregon, and Wyoming, the petition for certiorari and the relief prayed for therein should be granted.

Dated: Honolulu, Hawaii, September 20, 1991.

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Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-1937

In The

Supreme Court of the United States

October Term, 1991

WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

Petitioner,

vs.

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

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BRIEF OF THE STATES OF ALABAMA, ALASKA, IDAHO, INDIANA, MISSOURI, NEVADA, OKLAHOMA, OREGON, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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No. 90-1937

In The

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WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

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MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, IDAHO, INDIANA, MISSOURI, NEVADA, OKLAHOMA, OREGON, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONER

The States of Alabama, Alaska, Idaho, Indiana, Missouri, Nevada, Oklahoma, Oregon, and Wyoming, as Amici Curiae, and pursuant to this Court's Rule 37.5, file this Brief in Support of the Petition for Certiorari filed by the Director of the Department of Land and Natural Resources, State of Hawaii.

INTEREST OF THE AMICI CURIAE

The Amici States have an abiding interest in this case arising out of their concern that the United States Court of Appeals for the Ninth Circuit, in a series of recent cases,[1] has unduly expanded the reach of the federal courts' Article III power, and of the Civil Rights Act of 1871, 42 U.S.C. § 1983, in holding that private individuals may sue in federal court to redress what they consider to be violations of various restrictions placed on state lands, conveyed to the State of Hawaii upon admission to the Union, by the Hawaii Admission Act.

While each State's admission or enabling act has a unique history, many of these founding documents contain language that is similar to that relied upon by the Court of Appeals in this case to generate federal "rights" enforceable in private suits under 42 U.S.C. § 1983. In the Ninth Circuit alone, for example, public land trust provisions are set forth in the admissions acts of at least seven

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[1] *See, e.g., Keaukaha Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467 (9th Cir. 1984); *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985) (dictum), *cert. denied*, 474 U.S. 1055 (1986); *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990) (dictum); *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1991), *pet. for cert. filed*, No. 90-1941 (U.S. filed June 19, 1991); *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), *pet. for cert. filed*, No. 90-1937 (U.S. filed June 18, 1991); *see also Price v. State of Hawaii*, No. 90-15117 (9th Cir. July 11, 1991), *as amended* (9th Cir. Aug. 8, 1991). As pointed out by the petition, this case, along with that in No. 90-1941, are the first in which the Ninth Circuit, except in dictum, has expanded the enforceability of § 5(f) of Hawaii's Admission Act beyond cases involving only the Hawaiian Home Lands governed by the more particularized requirements of § 4 of the Hawaii Act.

States, in addition to Hawaii. These provisions state variously that certain public lands are to be granted "for the support of the public schools," *see* § 6(f) of the Alaska Admission Act, 72 Stat. 339, 341 (1958), or "for the support of common schools," *see* §§ 24, 28, of the Arizona-New Mexico Enabling Act, 36 Stat. 557, 572 (1910); § 4 of the Idaho Admission Act, 26 Stat. 215 (1890); §§ 10-13 of the North Dakota-South Dakota-Montana-Washington Enabling Act, 25 Stat. 676, 679-80 (1889); § 7 of the Nevada Enabling Act, 13 Stat. 30, 32 (1864); or "for the use of schools," *see* § 4 of the Oregon Admission Act, 11 Stat. 383 (1859). The Acts also provide lands for various other public purposes.[2] The admission acts of States

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[2] *See, e.g.*, § 6(a) of the Alaska Admission Act, 72 Stat. at 340 (lands "[f]or the purposes of furthering the development of and expansion of communities"); § 25 of the Arizona-New Mexico Enabling Act, 36 Stat. at 573 (lands for "university purposes" "penitentiaries," "insane asylums," "school and asylums for the deaf, dumb, and the blind," "miners' hospitals," "normal schools," "state charitable, penal, and reformatory institutions," and "agricultural and mechanical colleges"); §§ 10 and 11 of the Idaho Admission Act, 26 Stat. at 216 (lands for "an agricultural college," "a scientific school," "normal schools," "the insane-asylum located at Blackfoot," "the State University at Moscow," "the penitentiary located at Boise City," "other State, charitable, educational, penal, and reformatory institutions"); §§ 14 and 17 of the North Dakota-South Dakota-Montana-Washington Enabling Act, 25 Stat. at 680-81 ("university purposes," "school of mines," "normal schools," "agricultural colleges," "reform school," "deaf and dumb asylum," and "charitable, educational, penal, and reformatory institutions"); §§ 9, 10 of the Nevada Enabling Act, 13 Stat. at 32 ("a penitentiary or state prison," and "public roads, constructing ditches or canals, to effect a general system of irrigation of the agricultural land in the state").

outside of the Ninth Circuit admitted after the formation of the Union also make grants of lands for certain purposes.[3]

The decision of the court below in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), authorizes any private citizen who invokes 42 U.S.C. § 1983 to sue the officers of the State of Hawaii in federal court for a determination whether particular lands, which the private parties do not own and do not claim any specific part of, fall within the corpus of "trust" lands conveyed to Hawaii on its admission to the Union, and, if so, for an "appropriate remedy" if Hawaii's officials have improperly granted those lands to private parties. The Amici States are gravely concerned that the failure by this Court to reverse the judgment of

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[3] *See* § 7 of the Ohio Admission Act, 2 Stat. 173, 175 (1802); § 6 of the Indiana Enabling Act, 3 Stat. 289, 390-91 (1816); § 5 of the Mississippi Enabling Act, 3 Stat 346, 347 (1817); § 6 of the Illinois Enabling Act, 3 Stat. 428, 430-31 (1818); §§ 6-7 of the Alabama Enabling Act, 3 Stat. 489, 491 (1819); § 5 of the Missouri Enabling Act, 3 Stat. 545, 547 (1821); §§ 1-4 of the Act to Supplement the Arkansas Admission Act, 5 Stat. 58 (1836); § 6 of the Act to Supplement the Iowa and Florida Admission Act, 5 Stat. 789 (1845); § 2 of the Joint Resolution for annexing Texas to the United States, 9 Stat. 797-98 (1845); § 7 of the Wisconsin Enabling Act, 9 Stat. 56, 58 (1846); § 2 of the Wisconsin Admission Act, 9 Stat. 233 (1848); § 5 of the Minnesota Enabling Act, 11 Stat. 166-67 (1857); § 3 of the Kansas Admission Act, 12 Stat. 126-27 (1861); § 7 of the Nebraska Enabling Act, 13 Stat. 47, 49 (1864); § 7 of the Colorado Enabling Act, 18 Stat. 474, 475 (1875); §§ 4-11 of the Wyoming Admission Act, 26 Stat. 222, 223-24 (1890); §§ 6-12 of the Utah Enabling Act, 29 Stat. 107, 109 (1894); §§ 7, 8, and 34 of the Oklahoma Enabling Act, 34 Stat. 267, 272, 273, 283 (1906); §§ 7-10 of the Arizona-New Mexico Enabling Act, 36 Stat. 557, 562-65 (1910).

the Court of Appeals could lead other panels within the Ninth Circuit to expand the reach of § 1983 to similar suits against other States, based on their admission or enabling acts, and could encourage the remaining courts of appeals to extend § 1983 in a similar way vis a vis the States within their purview.

The Amici States are concerned that the Ninth Circuit has fundamentally misunderstood the reach of Article III and § 1983 on at least three major fronts. First, given that the private Respondent in this case, like the citizens of those States with analogous restrictive conditions in their Admission and Enabling Acts, has no specific entitlement to any distribution of public trust land, Respondent lacks Article III remedial standing to invoke the jurisdiction of the federal courts on the equitable claims which he seeks to litigate in this case. *See Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976). Indeed, four Justices have already expressed their views that Article III standing is lacking in just such suits. *ASARCO, Inc. v. Kadish,* 490 U.S. 605, 614 (1989) (Kennedy, J., joined by Rehnquist, C.J., Stevens, and Scalia, JJ.).

Second, irrespective of whether other grounds would oust "breach of trust" suits in federal court, the judgment below raises serious concerns under the Eleventh Amendment. While it would appear that, in light of this Court's decision in *Papasan v. Allain,* 478 U.S. 265 (1986), and related Eleventh Amendment principles, sovereign immunity would foreclose any remedy, the Ninth Circuit has opened the door to federal suits for "breach of trust" regarding lands conveyed on admission to the Union. The

Amici States have serious concerns over such a development, and for this additional reason ask that certiorari be granted.

Third, the Ninth Circuit has fundamentally misapplied this Court's doctrines that permit federal statutes to be enforced in limited circumstances under 42 U.S.C. § 1983. Particularly where, as here, it is dubious whether Respondent's claim that the Hawaii director has improperly managed state land "arises under" federal law in any sense, *see Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814-15 & n.12 (1986), the decision below inverts this Court's commitment to the defense of State prerogative with respect to lands conveyed to the States upon admission to the Union. *Compare Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). Amici submit that, because of the broad discretion conveyed to Hawaii by the "public use" requirement of § 5(f) of its Act, and the very limited avenue for judicial review Congress provided with respect to claims for breach of trust under that section, namely a "suit by the United States," the court of appeals erred in determining that Congress had not disallowed § 1983 as a remedy when it admitted Hawaii to the Union. *Wilder v. Virginia Hospital Association*, 110 S. Ct. 2510, 2517 (1990).

In filing this Brief in support of Hawaii, the Amici States do not suggest that, in Hawaii and elsewhere, proper management of state lands is an unimportant matter. Rather, to the contrary, precisely because such management is critical to the independence of the States, the Amici States submit that such issues as have been

brought to the lower federal courts by respondent ought to be litigated in the state courts and agencies which Hawaii – and all other states – provide.

Accordingly, because this case raises questions that go to the basic structure of relations between the States and the federal courts, and, if not reviewed, threatens to burden Hawaii and perhaps other States with litigation that improperly seeks to intrude on matters left to the States and their own courts and administrative agencies, this Court should grant the writ of certiorari sought by the Hawaii Director of Lands and Natural Resources. Given the relatedness of the issue whether a State's admission act may be enforced pursuant to 42 U.S.C. § 1983 to the issues pending in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), the Court may wish to hold the petition here pending a decision in *Suter v. Artist M.*

REASONS FOR GRANTING THE WRIT

Although the Ninth Circuit's analysis in this case is devoted mainly to deciding whether the District Court properly determined that the beachfront land dredged by the Waikoloa Beach Resort was owned by the State of Hawaii, and thus should not have been certified to the private owners of the Resort, the Court of Appeals' judgment is premised upon at least three fundamental determinations, each of which warrant review and reversal by this Court. In light of the limitations of Article III of, and the Eleventh Amendment to, the Constitution, as well as the doctrines that limit enforcement of federal statutes

via 42 U.S.C. § 1983, the judgment of the Court of Appeals threatens a fundamental restructuring of major doctrines which limit the authority of the federal courts over state land use matters. This Court should accordingly grant the writ to correct the numerous conflicts between the judgment below and this Court's precedents delineating the limits of federal power.

A. Certiorari Should Be Granted to Correct the Court of Appeals' Substantial Expansion of Article III Standing.

Although the issue was not addressed by the parties at the court of appeals stage, the Ninth Circuit understood that it had "a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' " *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). In concluding, however, that Respondent "Napeahi, as a native Hawaiian and beneficiary of this public trust, does have standing to enforce its provisions," 921 F.2d at 901 n.2, Pet. App. 7, the Ninth Circuit adopted a theory of Article III standing that has been long rejected.

The Ninth Circuit's standing analysis, as Petitioner demonstrates, *see* Pet. at 18, derives from that court's conclusion in an earlier case, *Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986), which had stated, in *dicta*, that a native Hawaiian litigant could meet Article III's requirements even if native Hawaiians "have no right to any trust funds." *Id.* at 630, *cited and quoted in Price v. Akaka*, 915 F.2d 469 (9th Cir.), Pet. App.

44, *cited in turn in Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), Pet. App. 7.

This theory of Article III standing, however, has been rejected by this Court, at least as early as *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). In *Simon*, this Court concluded that plaintiffs who alleged that they were being injured by the Government's wrongful failure to deny tax exemptions to certain private hospitals did not sufficiently allege a "case" or "controversy" with the Government in that the denial of the tax benefits (the requested relief) would not give rise to a sufficient likelihood of redress to the injury actually suffered by the Plaintiffs. In this case, because Hawaii would be free under its Admission Act to deny respondent any benefit from the parcel at issue, it is just as, if not more, speculative to assert that any relief that might lead to striking down the shoreline certification in this case would benefit this particular plaintiff. *See also Whitmore v. Arkansas*, 110 S.Ct. 1717, 1725 (1990); *Allen v. Wright*, 468 U.S. 737, 751, 760-61 (1984). Therefore, in this case where only equitable relief is sought, there is no Article III power.

At the very least, this Court should grant the Petition in light of the Article III analysis of the four-Justice opinion in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), which states:

> [E]ven if invalidation of the state law would create increased revenue for the school trust funds in the near future, an issue much disputed here, the allegations of economic harm rest on the same hypothetical assumptions as the taxpayer claims. If respondents prevailed and

> increased revenues from state leases were available, maybe state taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged. Even if the State were to devote more money to schools, it does not follow that there would be an increase in teacher salaries or benefits. These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. Whether the association's claims of economic injury would be redressed by a favorable decision made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict. We have much less confidence in concluding that relief is likely to follow from a favorable decision here than we had in cases like *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), where standing was found to be lacking because the probable response of private individuals to explicit tax incentive was judged to be too uncertain to satisfy . . . federal standing requirements.

490 U.S. at 614-15 (quoted at Pet. 18-19).

Amici submit that the views of the four Justices in *ASARCO* correctly define "the proper – and properly limited – role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and the writ should issue to make this clear.

Additionally, as Petitioner points out, this case raises an even further threat to Article III principles. This is so

because for any real relief to issue for Respondent here, it would be necessary for the federal courts to issue a directive to the Hawaii Attorney General, in essence, to prosecute a suit for ejectment against the present occupants of the beachfront.

More than fifteen years ago, this Court specifically rejected the proposition that Article III standings lies for this:

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973); *see generally Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (whether to initiate affirmative litigation is a matter "generally committed to an agency's absolute discretion" (citing decisions dating to the *Confiscation Cases*, 7 Wall. 454 (1869))). For this additional reason the Court should grant review in this case.[4]

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[4] Although the fact that further proceedings remain before a final judgment issues is a factor that would counsel denying the writ if there were an opportunity to re-present this threshhold issue to the lower courts, it is apparent that the Ninth

(Continued on following page)

B. Certiorari Should Be Granted to Correct the Court of Appeals' Substantial Erosion of the Eleventh Amendment.

Even if Article III were not a bar to the suit below, the lower court's allowance of continued litigation of "breach of trust" claims is contrary to this Court's elaboration of the limits imposed on federal jurisdiction by the Eleventh Amendment. Although the amendment was apparently not raised as a bar in the Court of Appeals, that fact does not prevent this Court from granting relief to the Hawaii Director. See *Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978) (per curiam); *cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 625-26 (1986) (failure to assert abstention defense in the court of appeals not determinative of issue in this Court, so long as issue was properly preserved in the District Court).

Amici submit that the injunctive and declaratory remedies prayed for by Respondent in this case are exactly the sort of relief of "breach of trust" that this Court previously held was impermissible in *Papasan v. Allain*, 478 U.S. 265 (1978). There, claims that Mississippi

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(Continued from previous page)

Circuit is firm in its rejection of the threshold arguments which Petitioner and Amici endorse. *See, e.g., Cammack v. Waihee*, 932 F.2d 765, 770 n.9 (9th Cir. 1991) (citing *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991) (rejecting Justice Kennedy's *ASARCO* views pending clarification from this Court)); *Price v. State of Hawaii*, No. 90-15117 (9th Cir. July 11, 1991) (chastizing Hawaii for seeking to raise threshold matters).

had allegedly misused public trust lands and was obligated, in some fashion, to "make whole" the lost trust corpus, were held barred by the Eleventh Amendment. Particularly where the private parties have been dismissed from this action, the remedies sought in this case "would only affect the State," and therefore are precisely the sort of "one-time restoration" that *Papasan* held was improper under the Eleventh Amendment. Certiorari should thus issue.

Even with *Papasan's* concerns put to one side, the Amici States are fundamentally concerned that the federal courts' entry into the essentially state questions concerning accreted or eroded lands runs afoul of the admonishment in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), that state law, qua state law, cannot be the basis for suits against state officials in the federal courts. As this Court held in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), "[u]nder our federal system, property ownership is not governed by general federal law, but rather by the laws of the several States," "unless some other principle of federal law requires a different result." *Id.* at 378. Only recently, this Court has made clear that "the individual States have authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988). Amici submit that whether Hawaii's shoreline certification process was correctly carried out is, at most, a state question for the state courts. Certiorari should issue to correct the lower court's intrusion on *Pennhurst*, and principles of sovereign immunity generally which prohibit the trying of the

State's title to land in federal court. *See Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 700 (1982).

C. Certiorari Should Be Granted to Correct the Court of Appeals' Novel Enforcement of State Admission Acts Through the Civil Rights Act of 1871, 42 U.S.C. § 1983.

Although not elaborated upon in its opinion, the Ninth Circuit's judgment rests additionally upon the proposition that 42 U.S.C. § 1983 grants a right "to enforce the provisions of the trust." *See* Pet. App. at 7 (citing *Price v. Akaka*, No. 89-15169 (9th Cir. Sept. 25, 1990), Pet. App. 46-47). Because this summary conclusion is wrong, review here is additionally counseled.

The Ninth Circuit's holdings that § 5(f) of Hawaii's Admission Act, which, insofar as relevant here, allows trust lands to be put to any "public use," and provides, as the sole stated remedy for a breach of the statute's requirements a "suit by the United States," is enforceable under § 1983 has ignored this Court's teaching regarding the implication of § 1983 remedies for asserted violations of federal statutes. For, in contrast to statutes that provide an "objective benchmark" for testing the State's performance, *cf. Wilder*, 110 S.Ct. at 2522-23, the discretion-conferred by Hawaii's admission act, as a matter of federal law, extends to the limit of Hawaii's constitutional powers. *Compare* § 5(f) of the Hawaii Admission Act, 73 Stat. 4, 6 (1959) ("public use" requirement) *with Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) ("public use" requirement is "coterminous with the scope

of the sovereign's police powers"). While additional constraints might be posed by state law, "there is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." *Oberlander v. Perales*, 740 F.2d 116, 119 (2d Cir. 1984). And the fact that Congress provided Hawaii with no ongoing funds to enforce the provisions of the public land trust cuts strongly against a holding that § 1983 provides an enforcement vehicle in this context. *See Wilder*, 110 S.Ct. at 2518 & n.10.

It is also dubious that Congress had any intent but to foreclose private enforcement in the Admission Act itself. It is anomalous to hold otherwise, for, as stressed above, the strong presumption is *against* any sort of reserved federal control over a State's lands conveyed by its admission to the Union. For Congress to be deemed to have allowed § 1983 enforcement, that intention should have been " 'definitely declared or otherwise made very plain.' " *Utah Division of State Lands v. United States*, 482 U.S. 193, 201-02 (1987). In fact, it is simply illogical to deem Congress to have allowed § 1983 suits in this context. Section 1983 could not be enforced when Hawaii's trust lands were administered by the United States. *See Ngirangas v. Sanches*, 110 S.Ct. 1737 (1990). Thus, as Petitioner points out, there was nothing in the way of § 1983 remedies to be "withdrawn" upon Hawaii's admission to the Union. *Cf. Wilder*, 110 S.Ct. at 2524 & n.19.

The fundamental error of the Court of Appeals here was to ignore the precise language, structure, and context, as well as the surrounding presumptions to be applied to the sort of statute sought to be enforced by

way of § 1983. This is, in essence, the sort of error which the States have called to the Court's attention in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991). Although it may be appropriate for the Court to therefore hold this case pending the disposition in *Suter*, this case, even more than the federal mandates imposed by the Adoption Assistance Act, warrants this Court's review as an inappropriate expansion of § 1983's enforcement reach. For this additional reason, the petition should be granted.

CONCLUSION

In urging this Court to grant the petition for certiorari, the Amici States do not diminish the important problems which appear to have animated the Ninth Circuit's efforts to federalize the litigation concerning Hawaii's public trust lands. However, the position of the Amici States is that the dispute in this case, if it belongs in a judicial forum, ought to be heard in the courts of the State of Hawaii.[5] For this reason, and all those others

[5] The Petition (*see* Pet. at 28-30) suggests that the case below ought to have been dismissed pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), or stayed pursuant to *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Amici agree that such a prudential course is warranted, providing a ground for mooting the important substantive issues here.

stated above, the Amici States urge the Court to grant the petition for certiorari in this case.

Respectfully submitted, August 23, 1991.

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No. 90-1937

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM F. PATY.,

Petitioner,

v.

MERVIN NAPEAHI

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE*, THE HOU HAWAIIANS, MAUI LOA AND KAMUELA PRICE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

INTEREST OF AMICI

THE HOU HAWAIIANS is a native Hawaiian *Ohana* (tribal or extended family group), which has been advocating the interests of native Hawaiian applicants for Hawaiian homestead lands and entitlements under section 5(f) of the Hawaii Admissions Act, before courts, legislatures and administrative agencies, since 1975. The Hou Hawaiians was founded in that year, by its Chief, MAUI LOA, born Doctor Nui Loa Price. He is a well known ethnic artist and craftsman who spends much of his time advocating justice for the native Hawaiian people. MAUI LOA is a native Hawaiian of 50 percent aboriginal blood, and has been a registered applicant with the Hawaii State

Department of Hawaiian Home Lands (DHHL) for a Hawaiian homestead allotment, since 1974.

KAMUELA PRICE, is not a native Hawaiian, but he is MAUI LOA's father and is a member of the Elder Counsel of THE HOU HAWAIIANS. Mr. Price is similarly devoted to the advancement of the interests of native Hawaiians.

Amici are responsible for the establishment of the Federal-State Task Force on the Hawaiian Homes Commission Act, in 1983, as part of the settlement of *Price v. Department of Justice*, C.A. No. 80-2794 (D.D.C.), in the United States District Court for the District of Columbia. KAMUELA PRICE was appointed by then Gov. George Ariyoshi, as a member of the Task Force. Through the efforts of the Task Force some 30,000 acres of homelands which had been appropriated for other uses by the State were returned to the jurisdiction of DHHL. As the further result of the work of the task force some 1500 native Hawaiians received awards of homesteads, and DHHL announced that its waiting list had been brought current. However, MAUI LOA, himself, has not yet received an allotment.

Amici have appealed to the U.S Court of Appeals from dismissal of four suits filed in the United States District Court for the District of Hawaii against the State of Hawaii or various state officers to enforce the rights of native Hawaiians conferred by Congress in § 5(f) of the Hawaii Admissions Act. These cases are: *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. den. sub nom. The Hou Hawaiians v. Hawaii*, 475 U.S. 1091 (1986); *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990), *cert. pending sub nom. Akaka v. Price*, (U.S. No. 90-1941); *Price v. State of Hawaii*

(hereafter called *Price v. Paty*), 921 F.2d. 950 (9th Cir. 1990); and *Price v. State of Hawaii*, slip op. C.A. No. 90-15117 and 90-15863 (9th Cir. July 11, 1991) (amended on denial of motions for rehearing Aug. 8, 1991) (hereafter *Price v. Sailors' Home Society*). The issues of standing and Eleventh Amendment immunity were raised by the defendants in each and every one of these cases.

SUMMARY OF THE ARGUMENT

This case is not a proper case in which to decide the issues raised by Petitioner in the Questions Presented for Review, because the issues were not sufficiently raised below. If the issues raised in the petition are important enough to warrant certiorari, it should be granted in the case of *Price v. Sailors Home Society*, C.A. No. 90-15117 and 90-15863, decided by the Court of Appeals on August 8, 1991.

ARGUMENT

Distilled down to their essence, the questions presented for review are: 1) Whether a native Hawaiian has standing to bring suit to enforce § 5(f) of the Hawaii Admissions Act? and 2) Whether state officers are protected from such suit by the Eleventh Amendment? As appears from the opinion of the Court of Appeals, neither of these issues was raised below.

The Court of Appeals opinion does not discuss the Eleventh Amendment issue. The Appendix to the Petition indicates that the issue was raised in the Memorandum in support of Defendants' motion to dismiss the First Amended Complaint. Pet. App., pp. 76a-80a. However, this point was raised in connection

with Plaintiffs' prayer for monetary damages. Pet. App. p. 77a.

The First Amended Complaint was further amended to drop all claims for damages, and the Eleventh Amendment issue does not appear to have been raised thereafter.

The issue of standing was clearly not raised by petitioner in the court below. The Court of Appeals so observed, and then raised the issue *sua sponte*, because it is jurisdictional under Article III of the U.S. Constitution. The Court of Appeals, in footnote 2, stated:

> "Although the parties have not, in this case, raised the issue of standing to enforce the provisions of the Trust, Napeahi, as a native Hawaiian and beneficiary of this public trust, does have standing to enforce its provisions. *See Price v. Akaka*, No. 89-15169, slip. op. at 11822-23 & n.2 (9th Cir. September 25, 1990)." App. p. 7a.

On the other hand, the issues of standing and Eleventh Amendment immunity have been raised and discussed by the Court of Appeals in each of the cases brought by *amici*. In *Price v. State of Hawaii*, *amici* brought suit seeking a ruling that a portion of the § 5(f) revenues be used to provide infrastructure for Hawaiian homelands to facilitate awards of homestead grants. Jurisdiction of the federal district court was predicated on 28 U.S.C § 1362. The district court dismissed the action, and the Court of Appeals affirmed, holding that § 1362 does not confer jurisdiction, because the Hou are not an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior."

Nevertheless, the court ruled that a native Hawaiian does have standing to bring suit against state officials for prospective injunctive relief and that such officials are not protected by the Eleventh Amendment. *Price v. State of Hawaii, supra*, 764 F.2d at 629-30.

In *Price v. Akaka, amici* sued the trustees of the Office of Hawaiian Affairs for allegedly using proceeds of the § 5(f) trust to benefit Hawaiians as distinguished from *native* Hawaiians.[1] The district court dismissed the action. On appeal, the Court of Appeals reversed, holding that native Hawaiians have standing to sue state officers individually for damages and that the officers are not protected from such suit by the Eleventh Amendment. *Price v. Akaka, supra*, 928 F.2d at 826-8.

In *Price v. Paty, amici* brought suit against the Chairman and members of the Board of Land and Natural Resources of the State of Hawaii for an accounting of assets and income from the trust. The district court granted summary judgment against plaintiffs, and the Court of Appeals affirmed. The Court of Appeals held that defendants are not accountable as ordinary trustees, because § 5(f) does not require the high standard of fiduciary duty often imposed by courts on trustees of native Americans. *Price v. Paty, supra*, 921 F.2d at 955. Nevertheless,

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[1] One of the purposes of the § 5(f) trust is the betterment of the condition of "*native* Hawaiians", defined in the Hawaiian Homes Commission Act, as persons of 50 percent or more aboriginal blood. "Hawaiians" are persons of *any* amount of aboriginal blood.

the Court of Appeals again rejected the perennial Eleventh Amendment immunity argument advanced by defendants, as follows:

> "This determination offers no succor to the state officials. The suit against present officials seeks prospective relief, which is proper. *See Keaukaha II*, 739 F.2d at 1472. To the extent that damages are sought against former officials, the State is not implicated. *See Price v. Akaka*, 915 F.2d at 473." *Id.* at p. 958.

Price v. Sailors' Home Society is, is a suit, similar to the instant case, seeking recovery of land that is allegedly part of the § 5(f) corpus. *Amici* brought suit to recover land conveyed by the Hawaiian government to a charitable organization by deed defeasible on the condition that the property is used for purposes other than as a sailors' home. The complaint alleges that the property is no longer being used as a sailors' home and under the reversionary clause is now part of the § 5(f) trust. The district court dismissed the complaint for failure to state a claim. The Court of Appeals went beyond the pleadings to make factual findings not made by the district court that the private grantee had obtained judicial approval of a redevelopment project on the subject property. Based on that factual assumption, the Court of Appeals affirmed in part and reversed in part. The Court ruled that the complaint did not state a claim against the private parties, but did against the state officials.

The defendants once again raised the issues of standing and Eleventh Amendment immunity. The Court of Appeals disposed of the standing argument as follows:

> "At the outset, we are met by the State's assertion that appellants lack standing. This issue can be quickly disposed of. We have previously made it clear that persons in the position of these appellants do have standing to challenge the use of section 5(f) lands. *See Akaka*, 928 F.2d at 826-27; *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990); *Price I*, 764 F.2d at 630. As we have said, although section 5(f) itself does not provide a private right of action, an action under 42 U.S.C. § 1983 is proper. *Ulaleo*, 902 f.2d at 1397; *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n.*, 739 F.2d 1467, 1470-71 (9th Cir. 1982) (Keaukaha II)." *Price v. Sailors' Home Society, supra*, slip op. at 10667.

The Court also made it clear that the Eleventh Amendment only precludes suits against the State for damages and does not preclude a suit against state officers in their official capacities for prospective injunctive relief or against them in their individual capacities for damages. *Id.*, at pp. 10667-9.

The Petitioner herein was not a party to *Price v. State of Hawaii* or *Price v. Akaka*. However, Petitioner is being sued herein only in his official capacity as Director of the Department of Land and Natural Resources.[2] Petitioner herein is represented

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[2] Petitioner is not named as a party in the complaint, first amended complaint or second amended complaint. Petitioner appears here only as successor to Susumo Ono, former Director of the Department of Land and Natural Resources.

by the Attorney General of the State of Hawaii, as were all of the state officers sued in all four of the cases brought by *amici*. None of the defendants in any of the cases mentioned above sought review by this Court of the adverse decisions therein on the issues of standing or Eleventh Amendment immunity.

The defendants in *Price v. Akaka* have petitioned this Court for a writ of certiorari. However, they did not raise the issues of standing or Eleventh Amendment immunity in the questions presented for review, even though they vigorously asserted those defenses in the courts below.

Amici question why Petitioner seeks review by this Court of issues not raised in the courts below, while passing up the opportunity to do so in other cases where the issues are raised, litigated and discussed by the Court of Appeals.

Petitioners suspect that the history of litigation in the case of *Trustees of the Office of Hawaiian Affairs v. Yamasaki* 69 Haw. 154, 737 P.2d 446, *cert. den.* 484 U.S. 898 (1987), may suggest an answer to this question. The history of the *Yamasaki* lawsuit was recently recounted in the June, 1991 issue of *Ka Wai Ola O OHA*, the official newspaper published by the Office of Hawaiian Affairs. That article is reprinted in the Appendix to this Brief.

According to OHA, the *Yamasaki* (Department of Transportation) suit was filed, in 1984, by OHA as a "friendly" suit at the suggestion of former Gov. George Ariyoshi. App., p. 3a. After the suit was filed,

> "Powerful state House Speaker and part-Hawaiian Henry Peters met with seven trustees and urged them to withdraw the suit. Governor

Ariyoshi publicly warned that the suit would adversely affect the state's revenue bonds." App., p. 4a.

* * *

"After years of stalling and delay, the Moloka'i and DOT cases (which had been consolidated into one suit) made their way to the U.S. Supreme Court, which on October 13, 1987, refused to hear OHA's claim against the State.

"The high court was saying, in effect, that the state legislature should clarify itself.

"The matter was destined to be decided politically, by negotiation with the new and more sympathetic administration of Governor John Waihee, who had been instrumental in the creation of OHA at the 1978 Constitutional Convention. These negotiations led to the historic ceded lands settlement between OHA and the state in 1990." App., p. 5a-6a.

Petitioner now cites the *Yamasaki* case for the proposition that native Hawaiians have no particular entitlement to § 5(f) funds. Pet. at 19-20. Petitioner describes the 1990 settlement between OHA and the state as follows:

"Likewise, the 1990 amendments reaffirm OHA's discretion to create programs with 5(f) revenue that rationally exclude various groups of its native Hawaiian beneficiaries from government benefits, and thereby to deny completely to certain native Hawaiians benefits flowing from the 5(f) trust corpus. (Similar discretion is likewise retained by Petitioner with respect to 5(f) proceeds not subject to the OHA trust, i.e., Haw.

Rev. Stat. § 171-18.)" Pet., p. 20, fn. 4.

Thus, while *amici* were litigating in federal courts to establish the right of the native Hawaiian to bring suit to enforce § 5(f) of the Hawaii Admissions Act, OHA was engaged in "friendly" litigation in the state courts resulting in a decision that the rights of native Hawaiians are a matter to be left to the discretion of the state legislature. Indeed, the trustees of OHA actually espoused the argument in *Price v. Akaka*, that native Hawaiians do not have standing to sue to enforce the § 5(f) trust.

Rather than spend trust money to provide homes and otherwise better the condition of native Hawaiians, OHA is now dedicating its efforts toward establishment of a new sovereign Hawaiian nation. OHA has accepted the purported "right" to exclude certain groups of native Hawaiians from § 5(f) benefits as a means of punishing groups like the Hou Hawaiians who dare to challenge their leadership and authority over this proposed new Hawaiian nation. [3]

Based on this historical background, *Amici* do not trust OHA to protect their rights, unless their right to sue is protected. While *amici* do not, in the slightest, doubt the integrity of the individual attorneys for Respondent, their fear of OHA is not assuaged by the fact that the Native Hawaiian Legal Corp., representing Respondent herein, receives a major

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[3] OHA's lack of concern for the plight of native Hawaiians results from their election by Hawaiians, rather than *native* Hawaiians. There are hundreds of thousands who claim to be Hawaiian, but only a few thousand surviving *native* Hawaiians.

portion of its funding from OHA. *Amici* fear the possibility of improper influence by OHA over Respondent's counsel. If Respondent loses in this case, the OHA trustees will win in *Price v. Akaka*.

But more importantly, Respondent in this case simply does not have the extensive experience in litigating the issues of standing and Eleventh Amendment immunity that *Amici* have. For example, *Amici* realize that the linchpin of Petitioner's argument against standing is the claim that the state has the "right" to exclude certain groups of native Hawaiians from § 5(f) benefits. OHA agrees with this point. If Petitioner is unable to prevail on this point, his argument against standing will evaporate.

Amici do not concede this point. The argument is based on the language "one or more of the foregoing purposes" in § 5(f). Petitioner argues that this justifies the use of the entire trust corpus for purposes other than the betterment of the condition of native Hawaiians. Amici would argue on the merits that the historical treatment of native Hawaiians and legislative history of the Hawaii Admissions Act demonstrate clearly that Congress intended that the § 5(f) trust *would* be used to better the conditions of native Hawaiians and that all native Hawaiians would share in the benefits of the Trust.

Part of the § 5(f) Trust corpus is the "available lands" set aside in the Hawaiian Homes Commission Act for Hawaiian homesteads. Every native Hawaiian desiring one, is entitled to a homestead award. The state has used the lack of infrastructure as an excuse for not providing homesteads to *Amici* and others. But the § 5(f) income was intended to be used to provide that infrastructure.

Under the law, every *native* Hawaiian is entitled, at least, to a decent home. In fact, however, native Hawaiians presently make up a large portion of the homeless population in his native land.

Congress has amply provided for the welfare of the few surviving native Hawaiians. Petitioner herein and the other state officials, including the trustees of OHA, are using plight of the *native* Hawaiian as a means of establishing a new sovereign Hawaiian nation, comprising several hundred thousand citizens or more.

This is not in the best interests of the United States. *Amici* would argue that the problem of the native Hawaiian can easily be solved by using a small portion of the resources provided by Congress.[4] Congress limited the benefits to those of 50 percent or more aboriginal blood to preserve the Hawaiian race. Encouraging the dilution of the race will eventually result in its extinction.

It is in the best interest of the United States and the native Hawaiian to enforce existing the Trust provisions for native Hawaiians. This simply will not be done unless native Hawaiians have the right to enforce their rights in the courts of the United States.

Amici believe that the issues of standing and immunity have been properly decided by the Court of Appeals. Therefore, *Amici* wish to preserve any and

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[4] The state receives $200 million annual rent from only one tenant at Honolulu International Airport. Two thirds of the airport is on Trust land. One-fifth of two-thirds of $200 million, is more than enough money to provide a decent home for each and every homeless native Hawaiian.

all objections to granting certiorari on these issues. However, if the Court deems these issues important enough to warrant certiorari, this case is not the proper vehicle for review. Petitioner is a defendant in *Price v. Sailors' Home Society* and the time for filing a petition for certiorari has not yet expired. The issues presented here have been raised and litigated in that case. Review should be made in a case where the issues were raised below.

CONCLUSION

For the foregoing important reasons, *Amici* respectfully request this Court to deny the Petition for Writ of Certiorari to the Ninth Circuit Court.

Dated: Honolulu, Hawaii, August 23, 1991.

Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)

Kamuela Price

The following is a reprint of an article appearing in the June, 1990 issue of *Ka Wai Ola O OHA*:

OHA vs. State of Hawai'i

On April 9, 1983, the Board of Trustees of the Office of Hawaiian Affairs authorized well-known attorney Boyce Brown to proceed with a lawsuit against the State of Hawai'i. The suit sought to retrieve OHA's 20 percent share of a $1.8 million settlement reached between the state and Moloka'i Ranch Inc. regarding illegal sand mining done by the ranch on public trust, or "ceded" lands at Kaluakoi, Moloka'i.

The technicalities of the suit were complex, but its historic importance cannot be overestimated. For the first time in its brief existence, OHA was not going to be polite. In fact, OHA would go all the way and *demand* its rightful and legal share of *all* public land trust revenues.

But OHA was already receiving about $1.2 million every year from the public land trust revenues, at least from those revenues collected by the Department of Land and Natural Resources. Wasn't that enough?

"No, it wasn't enough," says former Trustee Rod Burgess who, as chairman of OHA's land committee during those crucial years, led the charge for full payments from the public land trust. "We were going after our 20 percent of revenues from our lands, Hawaiian lands, and it wasn't up to the discretion of the state what OHA would get paid--the law was specific. We were going after what we were entitled

to."

As the trustees and their advisors became more knowledgeable about the public, or "ceded" land trust, became aware that they were being short-changed by the state. This was at about the same time that they realized that the monies they *were* getting from the trust, between $1.2 and $1.5 million annually, was barely enough to staff the office and pay overhead, much less service the needs of the Hawaiian community.

According to Trustee Moses Keale, "The Molokai sand-mining suit happened at a time when we were dickering with the state about what revenues from which lands OHA should get. The law said we get 29 percent from all income, period, but the department chiefs within the Ariyoshi administration had different ideas. So we had this jockeying back and forth."

Summarizing the Board's reasoning for the suit, constitutional lawyer Jon Van Dyke, a professor at the HU Law School and a long-time adviser to OHA, says "There was a lot of frustration, a feeling that the state was not responsive to OHA's concerns and claims, a sense the administration was nickel-and-dimeing OHA constantly."

The Department of Transportation (DOT), for example, wasn't sharing any of its revenue (estimated at $100 million annually) with OHA, even though the income-producing Honolulu International Airport and harbors throughout the state were on ceded land. The Department of Land and natural Resources (DLNR), which was providing all of OHA's ceded lands income, mostly from agricultural lease rents, had no way to ensure a full accounting for its quarterly payments to OHA, payments which fluctuated with every quarter,

depending on payments DLNR's tenants were--ore were not--making.

The Moloka'i sand mining suit, spearheaded by Trustees Walter Ritte, Rod Burgess and Hayden Burgess and endorsed unanimously by the Board was the first effort to raise this complex but vital issue of fairness and legal entitlement in the courts.

OHA's claims against the state made the newspaper headlines. To judge by the reaction, from commentators and editorial writers, you'd have thought that OHA (whose mandate was to help all Hawaiians, and whose annual budget would barely cover the purchase of a single home in Kohala) was being ungrateful.

Requests for a meeting with then-Governor Ariyoshi went unanswered. A meeting between Ariyoshi's DOT director, Ryokichi "Ricky" Higashionna, and a delegation from OHA ended quickly and nastily when Higashionna promised the delegation that OHA wasn't getting a penny from DOT and then threw them out of his office.

Finally, a few OHA trustees met with the governor in early 1984. He backed his appointed department heads, refusing to make any concessions. Instead, Hawaii's chief executive suggested OHA initiate a second, "friendly" lawsuit against the State of Hawaii, a suit that would settle the whole question of public trust lands revenues once and for all.

"The governor's suggestion was totally surprising and shocking,' Burgess says. "He had the discretionary authority to resolve the situation without a suit, but he went for the suit because he probably knew the financial impact of a negotiated settlement with OHA would have been significant. His concerns

were strictly political; he had a hot potato on his hands and rather than make the decision himself he passed the buck to the judiciary.

"This was the same governor," Burgess says, "who had promised us an 'open door policy' and here he was, on the first big issue we raised, and his policy becomes a closed-door policy. The suit was the only avenue he gave us."

Analyzing the situation from the perspective of seven years later, Trustee Keale says, "Nobody, including the governor, was ready to commit to OHA politically. They were hoping we would just fade away."

The trustees went back to their offices and did exactly what Ariyoshi suggested. They hired a second high-profile attorney, David Schutter, to join Boyce BROWN IN A SECOND LAWSUIT to claim one-fifth of the revenues from all DOT lands and from lands under the proposed Aloha Tower redevelopment and land leased to Matson Navigation Company on Sand Island in Honolulu Harbor. The stakes were high: OHA's projected 20 percent share of annual revenues from these lands was estimated at somewhere between $10 and $20 million.

The newspaper headlines announcing the second suit on march 9, 1984 were even bigger this time.

Very quickly a lot happened. Powerful state House Speaker and part-Hawaiian Henry Peters met with seven trustees and urged them to withdraw the suit. Governor Ariyoshi publicly warned that the suit would adversely affect the state's revenue bonds. A month later, Circuit Court Judge Edwin Honda heard arguments for a summary judgement as to whether OHA had legal standing to sue the state. (A year

later, after several delays, Honda allowed the suit to proceed.)

In the most shocking development to come out of the lawsuit, Deputy Attorney General James Dannenberg suggested that OHA was not in a position to sue because its trustees were elected by one racial group, which was unconstitutional under the equal protection clause. Dannenberg was, in fact, challenging OHA's very existence in the process of arguing the state administration's case.

Jon Van Dyke remains mystified by Dannenberg's suggestion that OHA was unconstitutional, especially after the Attorney General's office had already issued an opinion confirming OHA's legality in 1982. Van Dyke figures the challenge, as confused as it was, was "tactical, in the sense of trying to throw an obstacle in the litigation and scare the trustees; to say, in effect, 'Look, you guys are getting uppity, and if you pursue this line of reasoning, we're going to argue that you don't even exist."

in a March 8, 1984 statement released to the press at the time of the lawsuit, the trustees said, "The suit has been filed with great reluctance and only after two and one-half years of attempts to negotiate a fair and reasonable settlement with the state administration. Because the Department of Transportation refuses even to discuss our entitlements, we are left no option other than to seek justice in the courts.

"The Board of Trustees literally has no discretion in this matter. To ignore the DOT's adamant refusal to comply with the law would be a breach of fiduciary duty which could subject us to a suit by any of our beneficiaries."

After years of stalling and delay, the Moloka'i and

DOT cases (which had been consolidated into one suit) made their way to the U.S. Supreme Court which, on October 18, 1987, refused to hear OHA's claim against the state.

The high court was saying, in effect, that the state legislature should clarify itself.

The matter was destined to be decided politically, by negotiation with the new and more sympathetic administration of Governor John Waihee, who had been instrumental in the creation of OHA at the 1978 Constitutional Convention. These negotiations led to the historic ceded lands settlement between OHA and the state in 1990.

This chapter in OHA's history was a long and difficult one, seven years of legal maneuvering and acrimonious debate, both inside OHA and among the Hawaiian community, and in the state at large. There were those who urged OHA to be patient and those who thought law suits violated the principle of ho'oponopono. There were those who thought suing the State of Hawaii was "treason." To the general public, the endless headlines and courtroom clashes probably looked like so much wasteful, legalistic wheel-spinning, very far from the dream of a Hawaiian political entity leading Hawaiians in the creation of a better-and independent--community.

If the trustees had done nothing and meekly accepted whatever was offered, OHA might have been more "popular" with Hawaii's established power structure, but by the same token it would have become an ineffectual and dependent political tool, destined to pay lip service to the needs of the Hawaiian community with no resources to meet the challenges and goals that had been so optimistically charted in 1978. Through

this battle, as exhausting as it was, the Office matured as an advocate for Hawaiian entitlements and proved that it must be taken seriously.

MOTION FILED
AUG 23 1991

No. 90-1937

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October Term, 1991

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Petitioner,

v.

MERVIN NAPEAHI, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MERVIN NAPEAHI

BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MERVIN NAPEAHI

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The Office of Hawaiian Affairs ("OHA") hereby respectfully moves this Honorable Court for leave to file an Amicus Brief in the Supreme Court of the United States in support of Respondent Mervin Napeahi, *Napeahi v. Paty,* Civil No. 85-1523-HMF. The interests of the Amicus Curiae are set out in the brief attached hereto. The Office of Hawaiian Affairs seeks leave to file this brief because the issues on appeal impact on all Native

Hawaiians and have an importance beyond the interests of the parties.

This Motion is made pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the memorandum attached hereto, and the records and pleadings filed herein.

The Office of Hawaiian Affairs, which seeks to submit an Amicus Curiae Brief, sought the consent of the parties; however, Petitioner Paty refused to give consent to file this Amicus Curiae Brief.

DATED: Honolulu, Hawaii, August 20, 1991.

JAN R. SCHLICHTMANN
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BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MERVIN NAPEAHI

I. PRELIMINARY STATEMENT

The Office of Hawaiian Affairs (hereafter referred to as "OHA") respectfully submits this Amicus Curiae Brief in opposition to the Petition for a Writ of Certiorari in this case. The interests of the Amicus Curiae are set out below. Because OHA is the recipient (as trustee for native Hawaiians) of 20 percent of the income from the ceded lands trust, OHA opposes the action of the State of

Hawaii in this case because it diminishes the corpus of the ceded lands trust without resulting in any other type of benefit to native Hawaiians.

Furthermore, Amicus Curiae submits that this case presents a particularly inappropriate vehicle to address the complicated issues raised by the Petition for a Writ of Certiorari. The standing issues were not raised or briefed by either party at either the District Court or the Circuit Court level. *See Napeahi v. Paty*, 921 F.2d 897, 901 n.2 (9th Cir. 1990). Accordingly, OHA did not intervene in the lower courts as a party to protect its interests. Because these issues were not raised below, the opinion of the Court of Appeals for the Ninth Circuit makes only the most fleeting reference to them, *id.*, and thus does not provide this Honorable Court with its views on the range of questions raised by the Petition for a Writ of Certiorari.

Amicus Curiae submits that the Court of Appeals for the Ninth Circuit should be permitted to address the questions raised by the Petition for a Writ of Certiorari in appropriate subsequent cases, and that this Honorable Court should refrain from examining these questions until these issues are fully briefed by the interested parties (including OHA) and fully examined by the district and appellate courts.

II. INTEREST OF AMICUS CURIAE

Amicus Curiae is the Office of Hawaiian Affairs, the entity designated in the Hawaii State Constitution to represent the native people. The Trustees of the Office of Hawaiian Affairs are the duly elected representatives of

the Hawaiian people and are elected statewide by qualified voters who are of Hawaiian ancestry. The Trustees form a nine-member board and are elected for four-year staggered terms. (Hawaii State Constitution, Article XII, Sec. 5-6).

The establishment of the Office of Hawaiian Affairs was the culmination of several historical events. In January 1893, Westerners, primarily Americans, used arms to overthrow the lawful government of the Kingdom of Hawaii and its monarch, Queen Liliuokalani. The United States Minister in Hawaii ordered marines to be landed and recognized the new provisional government even before Queen Liliuokalani had surrendered. The Queen relinquished her government authority, but under formal protest to the United States. *See Liliuokalani v. United States*, 45 Ct. Cl. 418, 435 (1910).

The insurrectionists petitioned the United States for annexation of Hawaii by the United States but President Cleveland refused and found that " . . . [b]ut for the lawless occupation of Hawaii under false pretexts by the United States forces . . . the Queen and her government would never have yielded. . . . " President of the United States, Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess. XIII (1893). The provisional government then proceeded to establish the Republic of Hawaii; to abolish the Kingdom of Hawaii, the Legislature, and the monarchy; and to expropriate all the Hawaii Government and Crown Land without compensation. Hawaiian Island Constitution of 1894, art. 94 reprinted in the Fundamental Law of Hawaii 3 (L. Thurston ed., Honolulu: Hawaiian Gazette Co., Ltd., 1904). (The reigning Monarch had held title to the Crown

Land and the Government had held title to the Government Land.)

In 1898, however, the United States did proceed to annex Hawaii. At the time of annexation, the Republic of Hawaii ceded approximately 1,750,000 acres of formerly Government and Crown Lands to the United States. J. Hobbs, *Hawaii: A Pageant of the Soil* 118 (1935). The Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States "cede[d] and transfer[red] to the United States the absolute fee and ownership of all public, Government, or Crown lands . . . belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining." Joint Resolution, J. Res. 55, July 5, 1898, Sec. 1, 30 Stat. 750. The Joint Resolution of Annexation stated that existing federal laws dealing with public lands would not be applicable to such lands in Hawaii but "Congress shall enact special laws for their management and disposition." *Id.*

Another section of the Joint Resolution of Annexation provided that:

> [A]ll revenues from or proceeds of the [public lands], except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes. *Id.*

In an 1899 opinion, the United States Attorney General interpreted this language as subjecting the public lands in Hawaii to "a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the

Hawaiian Islands for educational and other purposes." 22 Op. Atty. Gen. 574 (1899).

The Joint Resolution was followed by Hawaii's Organic Act, approved April 30, 1900. Act of April 30, 1900, Ch. 339, 31 Stat. 141. The Organic Act established Hawaii's territorial government, confirmed the cession of Government and Crown Lands to the United States, and provided specific laws for the administration of public lands.

The Organic Act of 1900 provided that the Territory of Hawaii would retain control and management of these "ceded" lands, except for those lands "set aside" for the United States by either the Governor's or President's Executive order. Act of April 30, 1900, Ch. 339, 31 Stat. 141 (Sec. 91).

The Organic Act also provided that the proceeds from the territory's sale, lease, or other disposition of these ceded lands should be deposited in the territory's treasury for "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation." *Id.*, Sec. 73(4)(c).

Although the Republic had ceded absolute title of the Crown and Government Lands to the United States, both the Joint Resolution of Annexation and the Organic Act recognized that these lands were impressed with a special trust under the federal government's proprietorship. Hawaii's ceded lands never became part of the federal public domain. Because of their unique status, the United States received legal title to the lands, while a beneficial interest remained with the inhabitants of Hawaii.

One recognition of the unique status of ceded lands, as well as the special relationship between the federal government and native Hawaiians, came in 1921 with the passage of the Hawaiian Homes Commission Act. Act of July 9, 1921, Pub. L. No. 34, Ch. 42, 42 Stat. 108. The Act withdrew approximately 188,000 acres of ceded lands and brought them under the jurisdiction of the Hawaiian Homes Commission to be leased to native Hawaiians at a nominal fee for 99 years. *Id.*, Sec. 203, 207, 208. A native Hawaiian was defined in the Act as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.*, Sec. 201(a)(7). Thus, only certain native peoples could qualify for ceded lands designated to be under the jurisdiction of the Hawaii Homes Commission. Congressional Records reflect that in 1920 Hawaii's Delegate to Congress advocated that there be no blood quantum. He also said that if one were required that the definitions of native Hawaiian should be based on a one-thirty-second blood quantum. Nevertheless, the arbitrary requirement of a 50% blood quantum was adopted by Congress.

When Hawaii was admitted to statehood in 1959, the federal government returned to the State of Hawaii ownership of all the ceded lands which were not set aside for its own use. Section 5(f) of the Admission Act mandated the State to hold ceded lands (excluding the land reserved under the Hawaiian Homes Commission Act) as a public trust for one or more of five purposes, including betterment of the conditions of native Hawaiians (as defined in the Hawaiian Homes Commission Act of 1920). Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4. One portion of the special trust of the ceded

lands was thus specifically intended for native Hawaiians. Section 5(f) further provided that the use of the ceded lands, their proceeds and income for any purposes other than those enumerated "shall constitute a breach of trust for which suit may be brought by the United States." Thus, Section 5(f) in part can be viewed as a further safeguard to the continued existence of native Hawaiians and a further protection of their rights in native lands.

In 1978, the State of Hawaii held a Constitutional Convention. From 1893 until that time, persons of Hawaiian ancestry had been deprived of their original sovereignty and had not had their own government. In addition, neither the State of Hawaii nor its predecessor the Territory of Hawaii had implemented their ceded lands trust responsibilities, particularly with respect to the native Hawaiians.

The Delegates to the 1978 Constitutional Convention proposed a number of amendments to the Hawaii State Constitution to address these issues and the proposed amendments were adopted by a majority of the general public voters.

Until 1978, little attention had been focused on the trust language of section 5(f) of the Admission Act. At the 1978 Constitutional Convention, however, members of the Hawaiian Affairs Committee sought to implement the Admission Act's trust language as it relates to native Hawaiians. See, e.g., Constitutional Convention of 1978, Committee on Hawaiian Affairs Standing Comm. Rept. No. 59 and Committee of the Whole Rept. No. 13. As a

result, three new sections were added to what is now the Article XII of the fundamental law of the State of Hawaii.

Section 4 of Article XII now specifies that the lands granted to the state by Section 5(b) of the Admission Act (with the exception of the Hawaiian Homes Commission Act's lands) are to be held by the state as a public trust for native Hawaiians and the general public. Section 5 of Article XII establishes the Office of Hawaiian Affairs, to be governed by a nine-member elected board of trustees, which is to hold title to all real or personal property set aside or conveyed to it as a trust for persons of Hawaiian ancestry. Section 6 of Article XII sets forth the powers of the board of trustees and makes clear that the Office of Hawaiian Affairs is to hold in trust a pro rata portion of the income and proceeds derived from lands granted to the state by section 5(b) of the Admission Act.

The statutory purposes of the Office of Hawaiian Affairs include promoting the betterment of conditions of persons of Hawaiian ancestry; serving as the principal state agency for the performance, development, and coordination of programs and activities relating to Hawaiians; assessing the policies and practices of other agencies impacting on Hawaiians; conducting advocacy efforts; receiving, and disbursing grants and donations from all sources for Hawaiians; and, serving as a receptacle for reparations from the federal government. *See* Chapter 10, Hawaii Revised Statutes.

The Office of Hawaiian Affairs was established to serve all persons of Hawaiian ancestry. Thus, although the Office of Hawaiian Affairs' amendment names two beneficiaries of the OHA trust – native Hawaiians (those

with 50 percent or more aboriginal blood) and Hawaiians (those with any quantum of aboriginal blood) – the Office of Hawaiian Affairs at the present time is restricted to using its public land trust funds to benefit its native Hawaiian beneficiaries.

Securing a pro rata portion of the ceded land trust fund for native Hawaiians was a primary motive for establishing the Office of Hawaiian Affairs. Of equal importance, however, were the objectives of providing all persons of Hawaiian ancestry with the right to choose their leaders through the elective process and providing a vehicle for self-government and self-determination.

The Office of Hawaiian Affairs is a unique entity combining features of a public trust, government agency, and an independent entity with its own duly elected officials. The Office of Hawaiian Affairs is independent of the executive branch. Its independence is assured by its primary funding mechanism (the ceded land trust fund), its control over internal affairs, its ability to acquire and manage property, its power to enter into contracts and leases, and the elective process by which the Board of Trustees is chosen.

III. ARGUMENT

A. This Case Is Not an Appropriate Vehicle to Address the Complicated Issues Raised by the Petition for a Writ of Certiorari Because They Were Not Raised or Briefed Below or Addressed by the Lower Courts

The District Court in this case ruled that 1.75 acres of contested land on the Island of Hawaii (A) was not part

of the ceded lands trust because it was in private hands in 1898 and (B) would not have become part of the ceded lands trust even if it reverted back to the state through erosion. The Court of Appeals for the Ninth Circuit agreed that this land was in private hands in 1898, but reversed the District Court on its second holding, ruling instead that all private lands that revert back to the state because of natural phenomena such as erosion become part of the ceded lands trust. The case was thus remanded back to the District Court for a ruling on whether this land had reverted back to the state through erosion. 921 F.2d 897 (9th Cir. 1990).

The several highly complicated issues raised in the Petition for a Writ of Certiorari were not raised, briefed, or considered by the parties or the courts below. It is inappropriate for this Honorable Court to address them now, without the benefit of the guidance of the appellate court.

B. The Issues Raised by the Petition for a Writ of Certiorari Are of Central Concern to Amicus Curiae, and It Is Therefore Inappropriate to Address Them in a Case in Which Amicus Curiae Is Not Even a Party.

As discussed in Section II of this Brief, Amicus Curiae – the Office of Hawaiian Affairs – has a responsibility mandated by the Hawaii Constitution to protect the ceded public lands and the revenues they produce in order to preserve the resources for the native Hawaiian people. The issues raised by the Petition for a Writ of Certiorari are central to the ability of Amicus Curiae to

carry out this mission, and Amicus Curiae has a substantial interest in ensuring that these issues are considered and resolved in an appropriate fashion.

Because of the complexity of these issues, it is appropriate that they be considered carefully by the federal appellate court with primary responsibility for Hawaiian issues – the Court of Appeals for the Ninth Circuit – in cases that properly raise these issues with full briefing by all interested parties – including most specifically the Amicus Curiae Office of Hawaiian Affairs. Only after the Court of Appeals for the Ninth Circuit has provided its reasoned guidance should this Honorable Court finally address and resolve the issues raised.

The present case involves a straight-forward issue of Hawaiian land law which has been considered and properly resolved by the Court of Appeals for the Ninth Circuit, and the District Court should proceed to address the factual determination regarding whether the 1.75 acres had eroded after 1898. The complicated procedural issues are better addressed in later cases in which these issues are properly raised and briefed.

IV. CONCLUSION

For the reasons stated above, Amicus Curiae Office of Hawaiian Affairs believes that the Petition for a Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, August 20, 1991.

Respectfully submitted,

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